90-965

No._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ALVY T. McQUEEN,
Petitioner

v.

COMPTROLLER OF PUBLIC ACCOUNTS,
Respondent

ALVY T. McQUEEN
Petitioner,

v.

UNITED STATES OF AMERICA,
and COMPTROLLER OF PUBLIC ACCOUNTS,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a federal district court, in the exercise of its supervisory powers over the grand jury, has power to order the United States and the Comptroller of Public Accounts for the State of Texas, who obtained federal grand jury information illegally for use in civil tax assessments, to return that grand jury information to the grand jury and to not rely upon that grand jury information for civil tax purposes?

2. Whether Petitioner, who asserts that the State of Texas' jeopardy tax assessment system violates the federal Due Process guarantee of a prompt judicial hearing after the jeopardy tax assessment, has a "plain" state court remedy where the State of Texas has withdrawn jurisdiction from its courts to grant injunctions against the assessment and collection of state taxes, even when constitutional grounds are asserted?

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

The names of the parties interested in this action are set forth in the caption.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CASES

CONSTITUTION

STATUTES

RULES

MISCELLANEOUS

No._____

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Petitioner respectfully requests the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Court of Appeals consolidated these cases for decision. The opinion of the Court of Appeals (App., *infra* 1a - 16a) is reported at 907 F.2d 1544. Timely Petition

for Rehearing was filed on August 30, 1990, and was denied on September 14, 1990. The district courts' orders (App., *infra,* 20a - 27a) are not reported.

JURISDICTION

The court of appeals entered its judgments on August 9, 1990 (App., *infra,* 18a & 19a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This petition in the two cases is consolidated pursuant to Rule 12.2, Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

United States Constitution, Fifth Amendment:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

United States Code:

28 U.S.C., Section 1341

Section 1341. Taxes by States

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

Federal Rules of Criminal Procedure

Rule 6(e)

* * * * *

(2) *General Rule of Secrecy.* A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with these rules. A knowing violation of Rule 6 may be punished as a contempt of court.

(3) *Exceptions.*

(A) Disclosures otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel (including personnel of a state or subdivision of a state) as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph A(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. * * * * .

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding;

* * * * * *

(iv) when permitted by a court, at the request of an attorney for the government, upon a showing that such matters may disclose a violation of state criminal law, to an appropriate official of a state or subdivision of a state for the purpose of enforcing such law.

Texas Tax Code

§ 112.108. *Other actions prohibited.*

Except for a restraining order or injunction issued as provided by this subchapter, a court may not issue a restraining order, injunction, declaratory judgment, writ of mandamus or prohibition, order requiring the payment of taxes or fees into the registry or custody of the court, or other similar legal or equitable relief against the state or a state agency relating to the applicability, assessment, collection or constitutionality of a tax or fee covered by this subchapter or the amount of the tax or fee due.

STATEMENT

At all times here pertinent, Petitioner has engaged in the motor fuel distribution business. Petitioner is a wholesaler of diesel fuel. Petitioner purchases from suppliers or other wholesalers in the State of Texas and sells to retailers and other ditsributors.

At all times here pertinent, the state and federal governments have imposed state and federal motor fuel taxes upon suppliers of diesel fuel. At all times here pertinent, Petitioner has been a target of an industry-wide federal grand jury investigation in Houston, Texas, investigating possible criminal violations of federal motor fuels taxes. (App., *infra,* 3a, 8a & 9a. See fn. 2, p. 8, *infra.*) At all times here pertinent, Nancy K. Pecht, then an Assistant United States Attorney, was assisting the federal grand jury pursuant to Rule 6(e)(3)(A)(i), Federal Rules of Criminal Procedure[1], and Suzy Wong and Mark Hughes, IRS agents, were assisting the grand jury pursuant to Rule 6(e)(3)(A)(ii) and were under the supervision of Pecht. Pecht is referred to herein as the "AUSA" and the IRS agents are referred to herein as the "IRS Agents."

On June 18, 1988, the IRS Agents obtained and executed a search warrant of Petitioner's property, seizing boxes of Petitioner's business and other documents. The IRS Agents were acting in their roles as assistants to the grand jury, thereby making the documents seized "matters occurring before the grand jury" under Rule 6(e). Grand jurors and persons assisting the grand jury cannot disclose grand jury matters without an order from the district court supervising the grand jury pursuant to Rule 6(e)(3)(C). Rule 6(e)(2).

On June 23, 1988, the Comptroller of Public Accounts for the State of Texas ("Comptroller") made a jeopardy assessment against Petitioner for state motor fuel taxes in the approximate amount of $75,000 for the month of February 1988. (App., *infra,* 3a.)

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1. Unless otherwise noted herein, references to "Rule(s)" are to the Federal Rules of Criminal Procedure.

In September 1988, at the direction of the AUSA, the IRS Agents allowed agents of the Comptroller to review and photocopy Petitioner's documents seized on June 18, 1988. (App., *infra,* 39a.) At the same time, a civil agent of the IRS was reviewing and making detailed notes from the documents. (App., *infra,* 40a.) The AUSA did not obtain an order under Rule 6(e)(3)(C) authorizing the disclosure of the documents. (App., *infra,* 39a.)

On January 16, 1989, based on the materials obtained from the IRS Agents, the Comptroller increased the prior jeopardy assessment to approximately $250,000. (App. *infra,* 3a.)

On February 2, 1989, based on the materials obtained from the IRS Agents, the Comptroller made an additional jeopardy assessment exceeding $8,000,000 against Petitioner. (App., *infra,* 3a, 39a - 40a.) This jeopardy assessment was punitive and excessive, and far beyond Petitioner's ability to pay. (App., *infra,* 33a.) The Court of Appeals said that Petitioner did not impugn the validity of the assessment on appeal. (App., *infra,* 12a.) That was not an issue on appeal. Petitioner alleged below that the tax was exorbitant (App., *infra,* 32a - 33a), and that allegation was never denied, and must be taken as true for purposes of the appeal from dismissal on jurisdictional grounds.

Immediately upon making the February 2 jeopardy assessment, the Comptroller seized Petitioner's business and assets and filed liens against Petitioner's property. (App., *infra,* 40a.) As a result, Petitioner was forced out of business and irreparably injured. (App., *infra,* 40a).

Immediately after the levy on February 2, 1989, Petitioner sued the Comptroller in the United States District

Court for the Western District of Texas. (This case is referred to as *McQueen I.* (App., *infra,* 28a - 36a.) The basis for the suit was that the State of Texas offered no state court remedy which met the special federal Due Process requirements for valid jeopardy assessments. As interpreted by the United States Supreme Court in *Commissioner of Internal Revenue v. Shapiro,* 424 U.S. 614 (1976), federal Due Process requires that the taxpayer suffering a jeopardy assessment must have prompt access to a court in which the taxing authority asserting the jeopardy assessment must prove the probable validity of the assessment. Petitioner alleged that the State of Texas offered no such remedy. Petitioner asked the district court to enjoin the jeopardy assessments and levies pursuant thereto, to order the Comptroller to return to Petitioner Petitioner's assets levied upon by the Comptroller and to order the Comptroller to pay damages to Petitioner for his violation of Petitioner's constitutional guarantee of Due Process.

In the course of the hearing on Petitioner's request for temporary restraining order in this proceeding, the Comptroller's civil tax agent admitted that the January increased jeopardy assessment and the February assessment, and consequently the levy, were based upon documents obtained by the Comptroller from the IRS Agents who were then acting as assistants to the federal grand jury investigating Petitioner. Additional and more detailed testimony to that effect was later developed in an administrative proceeding in the Comptroller's office.

On March 25, 1989, the district court dismissed Petitioner's complaint in *McQueen I.* The District Court held that the Tax Injunction Act (28 U.S.C., § 1341) denied federal court jurisdiction to enjoin the collection of the state tax because the remedies in the state courts of Texas

were "plain, speedy and efficient" to redress Petitioner's federal constitutional claims. (App., *infra,* 20a - 25a.)

In June 1989, as a result of the disclosures as to the source of the documents for making the January increased jeopardy assessment and the February jeopardy assessment, Petitioner brought an action in the United States District Court for the Southern District of Texas (the court supervising the grand jury) asking the District Court to exercise its supervisory powers under Rule 6(e) against the United States and the Comptroller. (App., *infra,* 13a, 37a - 42a.) (This case is referred to as *McQueen II.*) The relief Petitioner sought included: (1) to order those persons who had received grand jury information unlawfully to return the information and documents to the grand jury; (2) to enjoin those persons from taking any further action in reliance upon information received in violation of Rule 6(e); (3) to order those persons to reverse any action (specifically the Comptroller's jeopardy assessments) based upon information received in violation of Rule 6(e); and (4) to compensate Petitioner for damage resulting to him as a result of the access those persons had to grand jury information in violation of Rule 6(e).

Without filing an answer, the United States moved to dismiss the complaint. The United States made no factual submissions on the record and filed no answer denying any of Petitioner's allegations, the critical ones being the documents disclosed to the Comptroller's civil tax agent constituted grand jury matters prohibited from disclosure by Rule 6(e).[2]

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2. Through unsupported allegations in its Motion, the United States alleged that the disclosures in question were made incident to an IRS administrative investigation being conducted by the AUSA and the IRS Agents contemporaneously with the grand jury investigation in which they were assisting. The United States asserted that it would support its allegations with an affidavit but never submitted an affidavit (perhaps because the allegations were not true). The

The district court thereafter dismissed the complaint on grounds that were not argued by the parties, at least in the public arguments,[3] and are so unintelligible that, on appeal, neither the Respondents nor the Court of Appeals even attempted to defend the District Court's analysis. (App., *infra,* 26a - 27a.)

In its consolidated opinion on these appeals, the Court of Appeals (Judge Goldberg writing the opinion, with Judges Politz and Jones joining) affirmed the district courts' dismissals of Petitioner's complaints (App. *infra,* 1a - 16a.) In *McQueen I* (the Due Process/injunction action), the Court of Appeals reasoned that Petitioner could invoke Texas' general injunction statute to obtain an adequate hearing in state court on his federal Due Process claims, thus raising the bar of the Tax Injunction Act. In *McQueen II* (the grand jury abuse action), the Court of Appeals held that the United States is not subject to the supervisory power of the district court because of the doctrine of sovereign immunity and, in any event, neither the United States nor the Comptroller were subject to the district court's supervisory powers under Rule 6.[4]

United States never explained how persons assigned to assist the grand jury in an industry wide grand jury investigation including Petitioner as a potential target could contemporaneously conduct an IRS administrative investigation in violation of IRS administrative rules prohibiting such a joint investigation because it would compromise Rule 6(e)'s secrecy requirements. See IRM par. 9267.32(2). Moreover, if the United States' suspicious unsupported version of the facts is true, the AUSA and the IRS agents would have committed a felony criminal act under IRC Code Section 7213(a)(1) in disclosing the information, which would then be characterized as tax return information which cannot be disclosed to the state for civil tax purposes without compliance with IRC Section 6103(d). The IRS has admitted pursuant to a Freedom of Information Act request that a valid Section 6103(d) disclosure did not occur here.

3. There was at least one attempted *ex parte* communication by the AUSA with the district court. The communication was in the form of a letter which was hand-delivered to the court's chambers.

4. In view of its affirmance of the dismissal in *McQueen II,* the

REASONS FOR GRANTING THE WRIT

1. The Grand Jury Case—McQueen II

a. Introduction

Rule 6(e), Federal Rules of Criminal Procedure, prohibits disclosure of matters occurring before the grand jury except pursuant to an order in certain limited classes of cases under Rule 6(e)(3)(C). The district court supervising the grand jury has the exclusive authority to determine if and under what circumstances grand jury information will be disclosed in this limited class of cases. In *United States v. Baggot,* 463 U.S. 476 (1983), this Court held that disclosures of grand jury matters for civil tax audit purposes are not within the classes of cases for which disclosure is authorized. In a related case, *United States v. Sells Engineering, Inc.,* 463 U.S. 418 (1983), this Court held that branches of the United States Department of Justice involved in civil cases are not entitled to automatic disclosure of grand jury matters under Rule 6(e)(3)(A)(i), but rather must proceed if at all only under Rule 6(e)(3)(C).

Accordingly, neither the Comptroller nor the IRS could have legally obtained these grand jury materials for purposes of their civil tax audits even had they first petitioned the supervising district court for a disclosure order under Rule 6(e)(3)(C). The Court of Appeals did not question that a district court which has improvidently granted either state or federal authorities access to materials through a Rule 6(e)(3)(C) order may order their return to the grand jury and

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Court of Appeals declined to address the issues raised in Petitioner's Motions related to the strange circumstances in the trial court, the principal one being the United States' *ex parte* communication. See fn. 3, *supra.* (App., *infra,* 16a, n. 21.)

prohibit reliance by those persons upon the materials. See e.g., *Sells Engineering, supra,* 463 U.S., pp. 422-423, n. 6, where this Court quoted favorably the Ninth Circuit's analysis that the district court had power to limit the United States' continued use of grand jury information, noting that continued use is continued illegal disclosure and holding that "the district court shall take such steps as are, in its discretion, necessary to protect the appellants from the effects of past disclosures;" see also *Matter of Special March 1981 Grand Jury,* 735 F.2d 575, 577 (7th Cir. 1985).

The issue here is whether the district court, although having full power to remedy and correct *legal* (albeit erroneous) access to grand jury materials, is powerless to remedy *illegal* access to grand jury materials. The Court of Appeals held that the district court is powerless to remedy illegal access.

Petitioner respectfully submits that the Court of Appeals' decision is such a startling and unprecedented limitation upon the powers of the district court that it should be reviewed by this Court. The holding violates the underpinning of this Court's holding in *Sells Engineering,* for surely there can be no difference in the district court's remedial powers based upon whether the access to grand jury materials is legal or illegal. Moreover, the issue is one of fundamental importance to the integrity of the grand jury system, and even beyond that to the entire court system, for the Court of Appeals' analysis would exempt the United States from any remedial powers of the federal courts with respect to any of their processes. Finally, focusing on Rule 6(e), the federal courts seeking to remedy abuses of their processes, whether *sua sponte* or at the behest of the

United States[5] or private parties pursuant to a derivative Rule 6(e) action, need guidance as to the scope of available remedies to insure the integrity of their grand jury processes.

b. The Court's Supervisory Power to Remedy Abuse of the Court's Process by Entering Orders Affecting the United States Is Not Limited by the Doctrine of Sovereign Immunity.

The centerpiece of the Court of Appeals' holding in *McQueen II* is the notion that the doctrine of sovereign immunity exempts the United States from the supervisory powers of the district court. The Court of Appeals equated the Rule 6(e) action with a private action against the United States. The Rule 6(e) action, however, is not a private right of action; it is rather a request that the district court exercise its supervisory powers to remedy abuses of Rule 6. A person such as Petitioner suffering from abuse of Rule 6 has standing to pursue the Rule 6(e) action, because the district court's remedial orders might also benefit the proponent of the action.

The courts have debated the theoretical nature of the Rule 6(e) action, and the better view is that the Rule 6(e) action is a request for the district court in invoke its supervisory powers and is not a private right of action.

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5. For example, immediately after the Court of Appeals rendered its decision in this case, the national press reported that the United States had sought and obtained an order from a district court ordering a third party innocently in possession of grand jury information and other confidential government information on computer disks to return that information to the government. *United States v. Charles Hayes, Individually, and d/b/a Challenger, Ltd.* (E.D. Ky.—Civ. No. 90-175). Under the Court of Appeals' resolution of this case, the supervising district court would have no power or authority to invoke such a remedy against a person not otherwise subject to the admonitions of Rule 6(e).

See for an excellent discussion of this issue, *In the Matter of Grand Jury Investigation (90-3-2),* 748 F. Supp. 1188 (E.D. Mich., October 9, 1990) (collecting and analyzing the authorities on this issue). In that case, the district court concluded that the doctrine of sovereign immunity precludes a private right of action against the United States, but is not a bar to the district court exercising its supervisory powers in the action commenced by private parties. As an interim measure to determine whether it should invoke its supervisory powers, the district court ordered the United States Department of Justice to investigate the matter. If the doctrine of sovereign immunity exempted the United States from the court's supervisory authority, that order could not have issued. The point is that the doctrine of sovereign immunity has never been considered a bar to the district court's supervisory powers under Rule 6(e). See also *DiVivo v. Egger,* 601 F.Supp. 1259 (D. Md. 1984) (rejecting the argument that sovereign immunity bars the Rule 6(e) action).

Although there has been debate as to the nature of the Rule 6(e) action, *no* court until the Court of Appeals decided this case has questioned the right of a private litigant to bring to the supervising district court's attention abuses of Rule 6(e) and to benefit from the supervising district court's exercise of its supervisory powers. The need for some procedure to bring illegal disclosures of grand jury matters to the supervising district court's attention should be apparent. Many, probably most, grand jury leaks are instigated by the Government agents assisting the grand jury. The Government agents involved, who are normally the persons to bring to the supervising court's attention illegal conduct involving the grand jury, are thus often the culprits, and will have no incentive to bring this type of illegal conduct to the supervising district

court's attention. In those cases, private parties such as targets of the grand jury investigation have the incentive; indeed the cases involving serious Government abuse of Rule 6(e) have been instituted and pursued by such private parties. If private parties aware of Government misconduct are denied the right to institute and pursue proceedings to invoke the district court's supervisory powers, the Government would have the raw power to violate Rule 6(e) with little concern that the matter will be remedied or stopped. No court has accepted that proposition until the Court of Appeals' decision in this case.

The Court of Appeals' holding is thus without precedent as a limitation upon the district court's supervisory powers. The holding is also inconsistent in principle with cases of this Court and other courts which have implicitly rejected the theoretical underpinning of the Court of Appeals' analysis—i.e., that the doctrine of sovereign immunity exempts the United States from the district court's supervisory powers. In *Sells Engineering,* this Court held that the district court did have supervisory authority over the United States in Rule 6(e) cases, without any suggestion that sovereign immunity was a limitation upon the Court's authority. The only difference between *Sells Engineering* and this case is that in *Sells Engineering* the United States obtained access to the grand jury materials legally pursuant to a facially valid Rule 6(e) order, whereas here the United States obtained access to the materials illegally. Since the doctrine of sovereign immunity does not and cannot turn upon whether the United States has acted legally or illegally, the Court of Appeals' decision must violate the underpinning of this Court's decision in *Sells Engineering* and other courts' holdings that valid Rule 6(e) actions may be maintained against

the United States. See e.g., *Barry v. United States,* 865 F.2d 1317 (D.C. Cir. 1987); *Blalock v. United States,* 844 F.2d 1546 (11th Cir. 1988), reh. denied 856 F.2d 200 (11th Cir. 1988); *In Re Grand Jury Investigation (Lance),* 610 F.2d 202 (5th Cir. 1980) (hereinafter cited as *"Lance"*) (asking for relief against the Justice Department and the office of the United States Attorney, both agencies of the United States).

There is no suggestion in the legislative history of the Rules of Procedure or support in law or logic for the proposition that Congress intended the courts' inherent supervisory powers to extend to everyone *except* the United States. Such a notion as adopted by the Court of Appeals is potentially applicable far beyond the narrow context of Rule 6(e), for it would seem to apply equally to exempt the United States from all exercises of the court's supervisory powers in any context (e.g., discovery disputes involving the United States in pending litigation, etc.). Even if Congress had expressly adopted that position, the position would be fraught with constitutional problems, for it shakes the foundation of our constitutional imperative that the King is not above the law and the Due Process notions of our litigation system. The truth is, of course, that Congress did not adopt that position.

Given the startling implications of the Court of Appeals' holding that sovereign immunity puts the United States outside the court's supervisory powers and thus above the law, this case should be reviewed for that reason alone, despite the other questionable holdings in the Court of Appeals' opinion, to which we now turn.

C. The District Court Supervising the Grand Jury Has Broad Supervisory Powers in Addition to Contempt to Remedy and Correct Abuses of Rule 6(e)'s Secrecy Requirements.

The Court of Appeals held that the district court's sole supervisory power to remedy violations of the secrecy requirement is to hold in contempt persons directly subject to the admonitions of Rule 6 (i.e., the AUSA, the IRS agents, and the grand jurors). The Court based its holding upon two related misreadings of Rule 6(e). First, the Court of Appeals read the term "may" in Rule 6(e)'s grant of authority to order contempt as a limitation upon the district court's supervisory power. Second, since contempt was the only remedy, the Court of Appeals reasoned that only persons subject to Rule 6(e)'s admonitions may be so sanctioned. The Court of Appeals makes no attempt to explain this curious reading of Rule 6(e)(2), or cite any rule of construction or policy position that supports it.[6]

The policy behind the secrecy requirement favors allowing the district courts supervisory authority to place all parties having illegal access to grand jury information in the places they would have occupied without illegal access to the information. Rule 6(e)'s secrecy requirement goes to the heart of our grand jury system. Any attempt to limit the district court's remedial powers for abuses would unnecessarily impair the strong policies behind the secrecy requirement, and thus would undermine the grand jury system. Accordingly, for policy reasons alone, the position accepted without analysis by the Court of Appeals is questionable.

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6. For example, in similar language Rule 6(b)(2) provides that a motion to dismiss an indictment "may" be based on objections as to the array or lack of qualification of an individual juror. Yet no one has ever suggested that these are the exclusive bases for motions to dismiss an indictment.

The case authority is consistent with the policy imperatives. Thus, for example, the Fourth Circuit has correctly noted contempt is not the exclusive remedy, and that "Some Rule 6(e) violations are correctable." *United States v. Coughlan,* 842 F.2d 737, 740 (4th Cir. 1988). This holding is a clear indication that the district court has the authority to correct the violations that are correctable and is not limited to contempt which is a punishment rather than a correction.

Moreover, this Court recognized in *Sells Engineering* that the supervising district court has power to issue appropriate orders affecting third parties in possession of grand jury information, including tax authorities. As noted above, in *Sells Engineering,* this Court cited with favor the Ninth Circuit's analysis that the district court had power to limit the United States' continued use of grand jury information, even when it had been legally obtained pursuant to a facially valid Rule 6(e) order from the supervising district court, and approved the Ninth Circuit's order that "the district court shall take such steps as are, in its discretion, necessary to protect the appellants from the effects of past disclosures." See *Sells Engineering,* 463 U.S., p. 422-423, n. 6, quoting with favor from *In Re Grand Jury Investigation No. 78-184,* 642 F.2d 1184 (9th Cir. 1981), aff'd sub nom. *United States v. Sells Engineering, Inc., supra;* see also *In re Sells,* 719 F.2d 985 (9th Cir. 1983) (a companion case to *Sells Engineering,* but decided after the Supreme Court opinion in *Sells Engineering*). The holding below that the supervising district court has no such power is irreconcilable with this Court's analysis in *Sells Engineering.*

The courts have also consistently recognized that there are actions other than contempt that the courts can and should take when appropriate to further the policies under-

lying the grand jury secrecy requirement, and that these policies can affect third parties (including the United States) wrongfully possessing grand jury information. These actions include the following:

1. Tax determinations based upon grand jury information obtained in violation of *Sells Engineering* may be suppressed. E.g., *DiLeo v. Commissioner,* T.C.M. (P-H), ¶ 89,540, p. 2699 (1989) (sustaining the IRS' tax determination only because the information was found not to be grand jury matters). The controversy in this context has principally centered around whether *Sells Engineering* had retroactive effect—i.e., whether information obtained by the tax authorities pursuant to facially valid Rule 6(e)(3)(C) orders issued prior to *Sells Engineering* may be used. See e.g., *In re Grand Jury Proceedings (Henry Kluger, Deceased),* 827 F.2d 868 (2d Cir. 1987); *Hajecate v. Commissioner,* 90 T.C. 280 (1988) (holding that *Sells Engineering* would not be applied retroactively to negate a deficiency based on facially valied Rule 6(e)(3)(C) order obtained prior to this Court's decisions in *Baggot* and *Sells Engineering*); and *DiVivo v. Egger,* 601 F. Supp. 1259 (D. Md. 1984) (interim order prohibiting the IRS from using information which had been disclosed pursuant to a facially valid pre-*Baggot* and pre-*Sells Engineering* order). These cases would be pointless if, even after *Baggot* and *Sells Engineering,* grand jury matters illegally disclosed to the tax authorities could be used for civil tax purposes. See e.g., *DiVivo v. Egger, supra.*

2. Other tax initiatives based upon illegally seized grand jury information may also be quashed. E.g., *Gluck v. United States,* 771 F.2d 750 (3d Cir., 1985) (summons enforcement granted to IRS only because the information was obtained prior to *Baggot* and *Sells Engineering* pursuant to a facially valid Rule 6(e) order); *Graham v.*

Commissioner, 770 F.2d 381 (3d Cir. 1985) (similar to *Gluck*). These cases also would be pointless if the United States could exploit illegally obtained grand jury information with impunity.

3. Governmental agencies and their officers can be enjoined from using or exploiting grand jury matters in their possession in violation of Rule 6(e)'s secrecy requirements. Thus, the Department of Labor, and employees thereof were enjoined from "viewing, reviewing, disclosing or publishing the contents of the grand jury transcripts." *Kocher Coal Co. v. Marshall*, 497 F. Supp. 73 (E.D. Penn. 1980), modified in part on other grounds 505 F. Supp. 156 (E.D. Penn. 1981).

The Fifth Circuit also ignored precedent in its own circuit and in other circuits which indicates that persons beyond those directly subject to Rule 6(e) are proper subjects of a derivative Rule 6(e) action. In *Lance, supra*, the Fifth Circuit did not even remotely hint that restraining orders of the type the movant there sought (restraining orders prohibiting further disclosures by the Justice Department and the United States Attorneys office) were inappropriate remedies under Rule 6(e). Likewise in cases exemplified by *Barry v. United States*, 865 F.2d 1317 (D.C. Cir. 1987), the courts have entertained requests for restraining orders to prohibit further disclosures without any hint that such relief is not available or appropriate.

The Court of Appeals grasped at straws in finding support for its holding in *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988). In that case, this Court held that an indictment should not be dismissed as a remedy for various grand jury abuses, including violation of the secrecy requirement of Rule 6(e) where, under the circumstances, the violation was "harmless error"

and did not prejudice the defendants vis-a-vis the indictment. Focusing on the violation of the secrecy requirement, this Court noted that such a violation does not *per se* indicate that the decision to indict was defective. The remedy in question—dismissal of the indictment—was not reasonably related to the error complained of. In so holding, this Court quite properly focused upon the contempt remedy as remedy for the particular violation to preserve the integrity of the secrecy requirement of Rule 6(e). This Court did not hold nor even suggest that had the target of the grand jury complained of some *other* injury (i.e., injury other than the bringing of the indictment), some other remedy consistent with the purpose of Rule 6(e) would never be available.

This case is thus materially different from *Bank of Nova Scotia.* Petitioner does not seek to quash or avoid an indictment or some other remedy unrelated to the abuse. Petitioner seeks only to place the parties in the positions they would have occupied had there been no illegal disclosure of grand jury materials. In *Bank of Nova Scotia,* placing the parties in the position they would have occupied without the disclosure required the indictment to stand; here, by contrast, placing the parties in the positions they would have occupied without the illegal disclosure requires the relief Petitioner requested. The remedies Petitioner seeks are thus consistent with and logically compelled by this Court's decision in *Bank of Nova Scotia.*

It would be anomalous indeed if tax authorities denied access to grand jury information through the front door can obtain and use the information through the back door by obtaining the information illegally. Had the tax authorities here sought and obtained the information through an improvidently granted Rule 6(e)(3)(C) order, the

supervising district court or an appellate court could have ordered return of the information and prohibit exploitation of the information by the tax authorities. See e.g., *Matter of Special March 1981 Grand Jury, supra,* and cases there cited, including *In Re Grand Jury Investigation No. 78-184,* 642 F.2d 1184, 1188 (9th Cir. 1981), aff'd sub nom. *United States v. Sells Engineering Co., supra.* Certainly, the tax authorities cannot be in a better position by obtaining the information illegally.

2. Tax Injunction Act Case—McQueen I

In the companion case (*McQueen I*), Petitioner asked the United States District Court for the Western District of Texas to enjoin the Comptroller's jeopardy assessments. Petitioner urged that the Texas jeopardy assessments violated the United States constitutional guarantee of Due Process because Texas failed to provide a taxpayer suffering a jeopardy assessment a prompt hearing in which the tax authority has the burden to establish the probable validity of the jeopardy assessment. In *Commissioner of Internal Revenue v. Shapiro,* 424 U.S. 614 (1976), this Court held that the established exception to the Federal Anti-Injunction Statute (§ 7421 of the Internal Revenue Code of 1954, now the Internal Revenue Code of 1986 (26 U.S.C.)) could be invoked to insure that prompt remedy for the citizen suffering the jeopardy assessment.

The Fifth Circuit held that the Tax Injunction Act (28 U.S.C., § 1341) precluded federal court jurisdiction. The Tax Injunction Act, the codification of principles of abstention, comity and federalism as they relate to state taxation, requires a federal court to refuse jurisdiction if it determines that the taxpayer's state court remedies for his federal claims are "plain, speedy and efficient." The Court of Appeals reasoned that the courts of Texas would

exercise their injunctive powers under Texas' general injunction statute to grant the relief sought here if Petitioner's constitutional claims were meritorous.

In reaching its conclusion, the Court of Appeals violated the fundamental precept of the Tax Injunction Act that a citizen will not be barred from federal court unless a state court remedy for his federal constitutional claims is reasonably certain. See e.g., *Tully v. Griffin,* 429 U.S. 68, 76 (1976); and *Spector Motor Service, Inc. v. O'Connor,* 340 U.S. 602, 605 (1951). This Court has recently articulated this standard in the converse, i.e., the citizen will not be relegated to the state courts if the state court remedy is speculative and uncertain. See *Franchise Tax Board of California v. Alcan Aluminum Limited,* ____ U.S.____, 110 S.Ct. 661 (1990), rehearing denied ____ U.S.____, 110 S.Ct. 1311 (1990). The reason for this standard is obvious from the language of the Tax Injunction Act and principles underlying it, for federal constitutional rights cannot be subservient to state court procedures that do not meet minimum Due Process requirements. The federal courts thus must be vigilant to insure that the state court remedies are indeed adequate before relegating a citizen asserting federal constitutional claims to the mercies of the state courts.

This vigilance is particularly critical now that review by this Court of adverse state decisions in cases such as this is discretionary rather than mandatory. A critical underpinning of the original doctrine relegating taxpayers asserting federal claims to the state courts was that, ultimately, the taxpayers could obtain federal review of the claims in the Supreme Court by way of guaranteed right of appeal from the state court system to the Supreme Court. The Tax Injunction Act and its predecessor policies of comity and abstention thus did not totally abdicate the

federal courts' ultimate resolution of the taxpayer's federal constitution rights to the states. Congress has recently changed this Court's jurisdiction over decisions of state courts denying federal constitutional claims. Jurisdiction is now pursuant to the discretionary certiorari procedure, rather than the mandatory appeal procedure which applied at the time the principles of comity and abstention were formulated and the Tax Injunction Act enacted. 28 U.S.C. § 1257, as amended by § 3 of P.L. 100-352. The change in procedure was designed to avoid Supreme Court review of all state court decisions on the merits. H. Rep. No. 100-660 (4 U.S.C.C.A. 766). There is no assurance now that a citizen asserting violation of federal constitutional guarantees in the application of state taxes will have a merits review in the federal system of an adverse decision by the state courts. The federal system thus must be particularly vigilant to insure that the essential predicate to raising the bar of the Tax Injunction Act—i.e., an *adequate* state court remedy—is present before relegating the citizen to the state court system.

The availability of a Texas court remedy to consider Petitioner's constitutional claims is not certain; indeed the Texas authorities persuasively establish that a *Shapiro* adequate remedy is doubtful and probably not available. As in *Shapiro,* the remedy to protect a taxpayer's rights in a jeopardy assessment setting is the injunctive remedy. The Texas tax litigation system for this type of tax is strikingly parallel to the federal system with which this Court was confronted in *Shapiro,* with one critical difference in that the Texas tax system expressly permits injunctions *only* upon the posting by the taxpayer of a bond in twice the amount of the assessment (a prohibitive amount here) and expressly *denies* the district courts authority to issue injunctions under any other circum-

stances regardless the unconstitutionality of the taxes in issue. Texas Tax Code, §§ 112.101 (permitting injunctions upon posting double bond) and 112.108 (denying injunctions in all other cases, including cases where constitutional rights are asserted). (The latter provision is referred to herein as the Texas Anti-Injunction Statute). A similar "Anti-Injunction" statute is contained in the federal tax code (§ 7421), but critically as this Court expressly noted in *Shapiro,* the federal system has recognized and accepted an exception to the Federal Anti-Injunction Statute based on *Enochs v. Williams Packing Co.,* 370 U.S. 1 (1962). Here, by contrast, the Texas system offers *no* recognized exception comparable to *Enochs* to the Texas Anti-Injunction Statute other than the double bonding exception, which even the Court of Appeals recognized did not satisfy Due Process where prohibitively large as in this case.

Instead, the Court of Appeals merely *assumed*—speculated would be more accurate—without one whit of authority that, if presented with the issue, the Texas courts would fashion whole cloth an *Enochs*-type injunctive remedy for a federal constitutional claim of invalidity of a state tax expressly subject to the Texas Anti-Injunction Statute. In support of this assumption, the Court cites only non-tax cases, none of which were ever even cited much less relied upon by the Comptroller here for the proposition that they offered an adequate state court remedy in this case.[7] More critically, those non-tax cases relied upon by the Court of Appeals did not express

7. The fact that the Comptroller and his counsel, the Attorney General of Texas, failed to recognize available state remedies is not controlling in this case, of course, but that fact does raise some doubt as to the Court of Appeals' conclusion as to the adequacy of these remedies when even the Comptroller and his counsel, who should have special expertise in this area, do not cite them in a case they strive mightily to win.

"Anti-Injunction" statutes such as involved here.[8] The Court of Appeals' assumption about what the Texas courts would do with a case squarely presenting the conflict with the Texas Anti-Injunction Statute is therefore sheer speculation, hardly rising to the level of certainty, or Due Process, for which the Tax Injunction Act relegates the citizen to the state courts.

Moreover, the Court of Appeals ignored the consistent authority raising substantial doubt that the courts of Texas would deviate from the Texas' legislature's carefully structured scheme to force tax litigation only through the refund or double-bonding injunction suit. The Texas Court of Appeals with the most expertise in state tax matters[9] has thus suggested that the Texas declaratory judgment action is not available in tax cases. See e.g., *Dub Shaw Ford, Inc. v. Comptroller of Pub. Accounts,* 479 S.W.2d 403, 406 (Tex. Civ. App.—Austin 1972, no writ);[10]

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8. See cases cited at footnote 10 of the Court's decision, which deal only with the issue of whether, before invoking an otherwise available remedy, an aggrieved party must first pursue the administrative process. The Court of Appeals was able to cite only a single case even remotely involving taxes subject to the Texas Anti-Injunction provision. *Texas Alcoholic and Beverage Control Commission v. Macha,* 780 S.W. 939 (Tex. Civ. App.—Amarillo 1989, err. den.). The point for which the Court cited this decision was that Petitioner might be able to enjoin the time period for invoking the administrative determination procedure while the Texas courts considered his *Shapiro* constitutional Due Process claims. The Court apparently recognized that this authority did not stand for the proposition that a Texas state court would enjoin the assessment and collection of the tax involved, and rightly so because the Texas Court of Appeals in *Macha* expressly stated that it was not deciding that general injunctive relief would be available in Texas courts outside the prescribed litigation channels noted above.

9. The Texas tax litigation scheme forces all tax litigation through the courts of Travis County, which sit in Austin, the state capital. Therefore, this Court of Appeals is the Court of Appeals with special expertise and authority for applying and developing the Texas tax litigation system in the manner the legislature intended.

10. This case involved the availability of declaratory relief, the

see also Crumbley, Shapiro & Williams, *Texas Tax Service* (Matthew Bender), § 3.05[2], pp. 3-24 - 3-26 (which is the leading authoritative commentary on Texas' tax system). Given the clear relation between the declaratory judgment action and the injunction action, it is extremely doubtful that the Texas courts would reject or question the availability of the declaratory judgment action and yet sustain the availability of the general injunction suit in the face of the express Texas Anti-Injunction Statute which denies both declaratory judgments and injunctions against taxes even if the taxes are unconstitutional.

Likewise, that same expert Court of Appeals has held that the remedies set forth in the Tax Code are exclusive, and has held that the State of Texas, which may not be sued without its consent, has not consented in this type of tax case to be sued in any other way. *Contran Corp. v. Bullock*, 567 S.W.2d 616 (Tex. Civ. App.—Austin 1978, no writ). Certainly, given the language of the Texas Anti-Injunction Statute expressly prohibiting injunctions even in cases where constitutionality of the tax assessment is questioned, there can be no question that the State of Texas has withheld its consent to suit in the precise circumstances where the Court of Appeals held, without authority, that the courts would allow such a suit.

The Court of Appeals also ignored the Comptroller's argument articulated at oral argument in response to a question from Judge Politz that, although the Comptroller wanted the Court of Appeals to hold for the Comptroller

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companion to the injunctive action. Despite a general statute authorizing declaratory relief, the Texas Court of Appeals held that the thrust of the Texas Tax Code to channel litigation into the refund suit or the double-bond injunction suit suggests that the declaratory remedy may not still be available. The same circumstance is also true for the injunctive remedy, where there is an express prohibition against injunctions except as authorized by the Texas Tax Code.

in *McQueen I* on the notion that a general remedy of some sort was available in state courts, the Comptroller reserved the right to press the contrary argument if indeed Petitioner attempted to pursue that alleged state court remedy. Certainly, if the remedy were available to the certainty required by the Tax Injunction Act, the Comptroller could not responsibly have advised the Court of Appeals that he reserved the right to argue in state court that the remedy is not available.

Even the Court of Appeals itself seemed ambivalent on the availablity of the general injunctive remedy to protect federal constitutional claims. The Court of Appeals thus suggested that in some other case it might not find this alleged remedy adequate under the Tax Injunction Act. (See fn. 9. App., *infra,* 2a.) Yet, if as held by the Court of Appeals the Texas courts would entertain general injunctive jurisdiction for Petitioner's federal constitutional claims, then certainly the Texas courts would entertain injunctive jurisdiction in *all* cases, with the result that Texas remedies would always be adequate under the Tax Injunction Act. There is no suggestion that a Texas court would discriminate among taxpayers or among types of federal constitutional claims for which the general injunctive remedy would be available (if *arguendo* it were available at all). There is thus no principled basis for the Court of Appeals' ambivalence. The Court of Appeals' ambivalence must be the product of a general uneasiness with the proposition upon which it based its decision, and a subtle attempt to hedge its bets with respect to future cases. But it is inescapable that the fact that the Court of Appeals could state seriously the proposition that the general injunctive remedy may not be available in another case is certainly grounds to doubt its availability to Petitioner without some clearer holding by the Texas courts to that effect.

The Court of Appeals also repeated by rote its prior holdings that Texas remedies for litigating tax issues were adequate for purposes of the Tax Injunction Act.[11] The Court of Appeals, however, did not acknowledge that the special Due Process considerations involving jeopardy assessments was not involved in those cases, nor did it acknowledge that those cases did not raise the conflict with the Texas Anti-Injunction Statute. Those cases are thus not authority for the proposition that Texas offers an adequate state court remedy to this Petitioner making these federal constitutional claims.[12] In short, the Court of Appeals abdicated its duty under the Tax Injunction Act, a Due Process duty, to insure that this Petitioner had a certain adequate remedy in the state courts.

We are concerned that the Court of Appeals' apparent haste to deny Petitioner a federal remedy may have been motivated in part by concern for the effect of the issuance of a federal injunction in this case. A federal injunction would call into question Texas' jeopardy assessment procedures, and that is serious business. The concern is, however, misplaced here. Texas' problem in this case is one of its own making. Instead of taking

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11. *Dawson v. Childs*, 665 F.2d 705, 710 (5th Cir., Unit A, Jan. 1982); *Alnoa G. Corp. v. City of Houston*, 563 F.2d 769, 772 (5th Cir. 1977), cert. denied 435 U.S. 970 (1978); *Tramel v. Schrader*, 505 F.2d 1310, 1314-1316 (5th Cir. 1975); and *City of Houston v. Standard-Triumph Motor Co.*, 347 F.2d 194, 199 (5th Cir. 1965), cert. denied, 382 U.S. 974 (1966).

12. Indeed, the Court of Appeals did not even attempt to explain its own holding in *Standard-Triumph*, 347 F.2d at 199, n. 10, that the remedial scheme for the types of taxes involved there had the effect of "eliminating the necessity for, and probably the availability of an equitable injunctive remedy." Thus, even if those cases *arguendo* raised the special Due Process and Anti-Injunction Statute considerations suggested here, they would be weak authority for the proposition upon which the Court of Appeals rested its decision—i.e., that, to the certainty required by the Tax Injunction Act, the Texas courts would invoke the general injunctive remedy to provide relief.

seriously this Court's unequivocal road map in *Shapiro* to minimum Due Process remedies to justify having jeopardy assessments in the first place, the state of Texas has done nothing to insure federal Due Process for persons suffering Texas jeopardy assessments. Governments, such as the United States, which take this Court seriously in its insistence that Due Process guarantees be protected, have adopted procedures meeting this Due Process imperative. For example, in direct response to *Shapiro,* the United States Congress sought help from the best minds in the country on the subject and crafted elaborate provisions assuring the taxpayer a prompt and fair court hearing on the issue. Section 7429, Internal Revenue Code of 1986. We can only speculate why the State of Texas has not done that, but one thing is absolutely sure—Texas' failure to act was not based upon any authority even remotely suggesting that, in the absence of legislation, the Texas courts would fashion an *Enochs*-type remedy whole cloth to override the Texas Anti-Injunction Statute.

The plain truth is that, in this case, through the connivance of federal and state authorities, the State of Texas has used the jeopardy assessment procedure to effectuate a forfeiture without an adequate Due Process remedy. The practical—and, we submit, the intended—effect of that forfeiture is to ruin Petitioner financially and thereby deny Petitioner effective counsel in the inevitable criminal proceedings that have already been commenced by the State of Texas. The federal and the state authorities thus knew that, had they attempted to forfeit Petitioners' property as an adjunct of criminal prosecution, they would have been prohibited from doing so by the requirement of Due Process showings under

the criminal forfeiture laws. They also knew that had they tried to achieve the same end through a jeopardy assessment under federal law, they would have encountered the *Shapiro* Due Process problem under § 7429 of the Internal Revenue Code. The record in both of these cases, considered together, raises the spector that the federal and state governments conspired to effect a forfeiture in the guise of a state jeopardy assessment.

We respectfully submit that the Court of Appeals' holding abdicates the federal court's responsibility to exercise vigilance in this egregious and outrageous case. This case offers a good vehicle for this Court to re-focus the lower federal courts on their responsibility to analyze available remedies carefully to insure citizens meaningful access to the state courts to litigate their federal constitutional claims.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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December 1990

APPENDIX INDEX

APPENDIX 1

Alvy Thomas McQUEEN, Individually
and d/b/ Livingston Oil,
Plaintiff-Appellant,

v.

Bob BULLOCK, Comptroller, in his official capacity,
Defendant-Appellee.

Alvy T. McQUEEN, Plaintiff-Appellant,

v.

UNITED STATES of America and Comptroller
of Public Accounts, State of Texas,
Defendants-Appellees.

Nos. 89-1257, 89-6146.

United States Court of Appeals,
Fifth Circuit

Aug. 9, 1990.

Taxpayer brought action against the Comptroller of Public Accounts of the State of Texas, seeking to enjoin Comptroller from administering applicable Texas tax scheme. The United States District Court for the Western District of Texas, James R. Nowlin, J., denied injunction, and taxpayer appealed. In separation action, the United States District Court for the Southern District of Texas, Kenneth M. Hoyt, J., dismissed taxpayer's claim against United States and Comptroller based on alleged violations of grand jury secrecy rule, and taxpayer appealed. After consolidating appeals, the Court of Appeals, Goldberg, Circuit Judge, held that: (1) Texas law provided

remedies that were "plain," "speedy," and "efficient," within meaning of Tax Injunction Act, precluding district court from exercising jurisdiction over taxpayer's due process claim, and (2) doctrine of sovereign immunity barred taxpayer's action against United States for alleged violations of grand jury secrecy rule.

Affirmed.

[West Key Notes Omitted]

Appeal from the United States District Court for the Western District of Texas.

Appeal from the United States District Court for the Southern District of Texas.

Before GOLDBERG, POLITZ and JONES, Circuit Judges

GOLDBERG, Circuit Judge:

In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.[1]

Our Janus-faced sovereignty has once again raised its head. Posing for the republic, it demands uniformity. Yet behind its state-bordered cloak, it languishes to be different in any one of fifty stately ways. This tense but tensile and sometimes tenacious duality fits tersely within our jurisdictional doctrine—doctrine which we sometimes extend to union causes, but that today, obliges us to restrain for the state.

In separate actions, Alvy T. McQueen ("McQueen") sued the United States and the Comptroller of Public Accounts of the State of Texas (the "Comptroller").

1. James Madison, The Federalist No. 51.

For this appeal, we consolidated both actions. In the Western District of Texas, McQueen sought to enjoin the Comptroller from administering the applicable Texas tax scheme which he claims is in violation of federal procedural due process requirements.[2] The district court denied the injunction. ("*McQueen I*"). We affirm.

In the Southern District of Texas, McQueen claimed that the United States and the Comptroller violated rule 6 of the Federal Rules of Criminal Procedure. The district court dismissed the complaint. ("*McQueen II*"). Under a different rationale, we affirm.

I. THE FACTS

In June of 1988, the Comptroller assessed McQueen approximately $75,000 for taxes allegedly owed. The Comptroller increased this assessment to $250,000 in January of 1989. Then, one month later, in February of 1989, the Comptroller assessed McQueen an additional eight million dollars. The Comptroller claimed that it imposed the assessments because McQueen, a fuel distributor, failed to remit diesel fuel taxes due under the Texas tax code.

McQueen attempted to avail himself of an administrative hearing after each assessment. The record on appeal does not indicate that Texas issued any rulings. Throughout the time of this appeal, however, a federal grand jury has been investigating motor fuel tax evasion. Whether or not this grand jury targeted McQueen remains unclear. McQueen, however, claims that the Comptroller obtained the information necessary to impose the assessments by violating, in tandem with the United States, federal grand jury secrecy provisions.

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2. In *McQueen I*, McQueen sued the Comptroller, Bob Bullock, in his individual and official roles.

II. *McQUEEN I:* PROCEEDINGS BELOW

McQueen filed a complaint, a request for a temporary restraining order, and a request for a preliminary injunction in the Western District of Texas. The Comptroller opposed the temporary restraining order and also filed a motion to dismiss. The district court denied the temporary restraining order and the preliminary injunction and granted the Comptroller's motion to dismiss McQueen's complaint. The court held that the Tax Injunction Act deprived it of jurisdiction to consider the injunction and the complaint. According to the district court, because the Comptroller provides remedies to taxpayers that are, in the terms of the Tax Injunction Act, "plain, speedy and efficient," McQueen could not enjoin the administration of the applicable Texas tax statutes in federal court. McQueen appealed.

III. *McQUEEN I*: DISCUSSION

[1] McQueen claims, *inter alia*,[3] that the magnitude of the jeopardy assessments caused him to suffer an irreparable injury. Given this injury, he argues that the applicable Texas tax scheme contravenes federal procedural due process requirements because it fails to provide: (1) a prompt post-deprivation hearing that establishes the probable validity of the assessments; and, (2) an impartial administrative law judge to preside over this constitutionally mandated hearing. These deficiences, according to McQueen, preclude application of the Tax Injunction Act, which generally bars federal court jurisdiction over state tax administration. Instead, he concludes that the Tax Injunction Act compels us

3. We have considered McQueen's other claims but because our ruling disposes of the case on other grounds, we do not discuss them here.

to confer jurisdiction because, in the statute's language, the remedies that Texas provides are not "plain," "speedy," or "efficient." We disagree.

[2] The Tax Injunction Act states that:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.[4]

Under Supreme Court precedent, the Tax Injunction Act imposes an equitable duty on federal district courts to refrain from exercising jurisdiction over claims arising from state revenue collection except when the remedies the state provides could prevent a taxpayer from asserting a federal right.[5] State remedies that prevent the assertion

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4. 28 U.S.C. § 1341.

5. *Tully v. Griffin Inc.*, 429 U.S. 68, 73-75, 97 S. Ct. 219, 222-24, 50 L.Ed.2d 227 (1976) ("A federal district court is under an equitable duty to refrain from interfering with a State's collection of its revenue except in cases where an asserted federal right might otherwise be lost. . . . We turn to the basic inquiry—whether under New York law there is a 'plain, speedy and efficient' way for [the taxpayer] to press its constitutional claims while preserving the right to challenge the amount of tax due. . . ."); *See also California v. Grace Brethren Church*, 457 U.S. 393, 411, 102 S. Ct. 2498, 2509, 73 L.Ed.2d 93 (1982) ("In particular, a state-court remedy is 'plain speedy and efficient' only if it 'provides the taxpayer with a full hearing and judicial determination' at which she may raise any and all constitutional objections to the tax [citations omitted]."); *Rosewell v. City of LaSalle National Bank*, 450 U.S. 503, 514, 101 S. Ct. 1221, 1229-30, 67 L.Ed.2d 464 (1981) (same); *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 300-301, 63 S. Ct. 1070, 1074, 87 L.Ed. 1407 (1943) ("[I]t is the court's duty to withhold such relief when, as in the present case, it appears that the state legislature has provided that on payment of any challenged tax to the appropriate state officer, the taxpayer may maintain a suit to recover in back. In such a suit he may assert his federal rights and secure a review of them by this court. This affords an adequate remedy to the taxpayer, and at the same time leaves undisturbed the state's administration of its taxes.").

of a federal right are not, in the words of the Tax Injunction Act, "plain," "speedy" or "efficient." If they do, a federal court may assert jurisdiction over a state taxpayer's claim.

Historically,

> The reason for this guiding principle [of equitable restraint] . . . [was] of peculiar force in cases where the suit, like the present one, [was] brought in enjoin the collection of a state tax in courts of a different, although paramount, sovereignty. The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it.[6]

Equity practice, federalism, and a state's imperative need to administer its fiscal operations thus constitute the statute's marrow.[7] However, "[t]his last consideration was the principle motivating force behind the [Tax Injunction Act]: this legislation was first and foremost a vehicle to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes."[8]

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6. *Matthews v. Rodgers*, 284 U.S. 521, 525, 52 S. Ct. 217, 219 76 L.Ed. 447 (1932).

7. *Tully v. Griffin Inc.*, 429 U.S. at 73, 97 S. Ct. at 222-23; *Rosewell v. City of LaSalle National Bank*, 450 U.S. at 522, 101 S. Ct. at 1233-34.

8. *Franchise Tax Board of California v. Alcan Aluminum*, 493 U.S. ___, ___, 110 S. Ct. 661, 666, 107 L.Ed.2d 696, 705 (1990); *California v. Grace Brethern Church*, 457 U.S. at 409, 102 S. Ct. at 2508; *Rosewell v. City of LaSalle National Bank*, 450 U.S. at 522, 101 S. Ct. at 1233-34.

Under the Tax Injunction Act, McQueen has a "plain," "speedy," and "efficient" remedy because Texas courts would permit him to assert his federal claims.[9] Texas courts do not demand the exhaustion of administrative remedies but instead extend jurisdiction to remedy the irreparable injuries that agencies cannot redress.[10] Sim-

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9. We note that we have previously addressed the adequacy of Texas remedies under § 1341 and have found them to be "plain, speedy and efficient." *See Dawson v. Childs*, 665 F.2d 705, 710 (5th Cir. Unit A Jan. 1982) (taxpayer has access to injunctive relief or declaratory judgment under Texas law to enjoin a tax lien); *Alnoa G. Corp. v. City of Houston*, 563 F.2d 769, 722 (5th Cir. 1977) ("spectre of arbitrariness" in state proceedings insufficient basis to justify federal intervention—"state remedy need not be best of all possible remedies . . . only adequate."); *Tramel v. Schrader*, 505 F.2d 1310, 1314-16 (5th Cir. 1975) (state remedies are adequate with regard to special assessments); *City of Houston v. Standard Triumph Motor Co.*, 347 F.2d 194, 199 (5th Cir. 1965), *cert. denied*, 382 U.S. 974, 86 S. Ct. 539, 15 L.Ed.2d 466 (1966) (Texas provides for adequate injunctive and declaratory relief for taxpayer resisting ad valorem tax assessment.). The facial validity of the Texas remedies is thus well established. However, McQueen also challenges these remedies as they are applied to him. While we find they are also adequate as applied to McQueen, this is not to say that Texas remedies will necessarily always be adequate *as applied* in every individual case.

10. *Houston Federation of Teachers Local 2415 v. Houston Independent School District*, 730 S.W.2d 644, 646 (Tex. 1987) (Mauzy, J., concurring, Kilgarlin, J., concurring joined by Wallace, J., Hill, J., dissenting joined by Gonzalez, J.) ("Parties are not required to pursue the administrative process regardless of price. If irreparable harm will be suffered and if the agency is unable to provide relief, the courts may properly exercise their jurisdiction in order to provide an adequate remedy."); *Glen Oaks Utilities Inc. v. City of Houston*, 161 Tex. 417, 340 S.W.2d 783, 785 (1960) ("Generally the plaintiff has not actually suffered any injury until the administrative processes have been completed and the ruling complained of has been put into effect. . . . [However], [a]n administrative body cannot, by reserving for itself the power to change a ruling, deprive the courts of jurisdiction to the detriment of the parties injured by the ruling. . . . Since the ordinance in question went into effect immediately upon its enactment, petitioners had the immediate right to turn to the courts for relief."); *Public Utility Commission of Texas v. Pedernales Electric Cooperative Inc.*, 678 S.W.2d 214, 220 (Tex. Civ. App. 1984) ("There is an important corollary to the *exhaustion* doctrine. The

ilarily, they extend jurisdiction over claims that an agency contravened constitutional imperatives.[11] In a Texas trial court, McQueen could thus claim that the Comptroller violated federal procedural due process requirements by failing to provide a neutral administrative law judge to promptly determine the validity of the assessments which allegedly caused McQueen to suffer an irreparable injury.

And, while a Texas trial court considers McQueen's constitutional claims, it can also enjoin the running of the time period available to implement the Comptroller's administrative proceedings. The Texas legislature, under the Texas Constitution's authority,[12] permits Texas courts to grant injunctions if "irreparable injury to real or per-

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doctrine comes into effect *only* if the administrative remedy is realistically *adequate* to protect the asserted claim. One is *not* compelled to exhaust an administrative remedy that is *not* compelled to exhaust an administrative remedy that is inadequate or that is insufficient fully to protect against the injury alleged by the applicant for injunction."); *Southwestern Bell Telephone Co. v. Public Utility Comm. of Texas*, 618 S.W.2d 130, 134 (Tex. Civ. App. 1981) ("When, as here, an agency issues an order beyond its authority and thereby interferes with substantial business interests of a person, he may resort immediately to the courts for protection and need not await completion of the administrative proceeding. . . . Moreover, it is well established that there exists an inherent right to appeal to a district court from an administrative order that violates a constitutional right and a district court may act to protect that right."); *Texas State Board of Pharmacy v. Walgreen Texas Co.*, 520 S.W.2d 845, 848 (Tex. Civ. App. 1975) ("The principle of exhaustion of administrative remedies, like many judicial doctrines, is subject to exceptions. In those cases wherein the exhaustion of administrative remedies will cause irreparable injury, or wherein administrative remedies are inadequate, or wherein the agency's action is unconstitutional or beyond its jurisdiction or clearly illegal, the principle is sometimes relaxed.").

11. *Southwestern Bell Telephone Co. v. Public Utility Comm. of Texas*, 618 S.W.2d at 134; *Texas State Board of Pharmacy v. Walgreen Texas Co.*, 520 S.W.2d at 848.

12. Texas Constitution Article 5 section 8.

sonal property is threatened, irrespective of any remedy at law." Tex. Civ. Prac. and Rem. Code Ann. Section 65.011 (Vernon 1986).[13]

This general injunction statute, section 65.011, satisfies one of the Supreme Court's federalism concerns under the Tax Injunction Act. *In Tully v. Griffin Inc.*, the Court stated:

> It also seems clear that under New York law Griffin can fully preserve its right to challenge the amount of tax due while litigating its constitutional claim that no tax at all can validly be assessed against it. Griffin, in other words, need not accept as binding the Tax Commission's rough estimate of its sales tax liability as price of challenging the constitutionality of the tax.

Texas jurisprudence provides no reason to believe that Texas courts, unlike New York courts, would penalize McQueen for challenging the constitutionality of his ad-

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13. Section 65.011, entitled "Grounds Generally" states:
A writ of injunction may be granted if:
(1) the applicant is entitled to the relief demanded and all or part of the relief requires the restraint of some act prejudicial to the applicant;
(2) a party performs or is about to perform or is procuring or allowng the performance of an act relating to the subject of pending litigation, in violation of the rights of the applicant, and the act would tend to render judgment in that litigation ineffectual;
(3) the applicant is entitled to a writ of injunction under the principles of equity and the statute of this state relating to injunctions;
(4) a cloud would be placed on the title of real property being sold under an execution against a party having no interest in the real property subject to execution at the time of sale, irrespective of any remedy at law; or
(5) irreparable injury to real or personal property is threatened, irrespective of any remedy at law.

ministrative remedy by allowing the administrative limitations period to run.[14] Similarly, Texas jurisprudence does not suggest, or even cast a penumbra of a doubt, that McQueen would have to invoke the taxpayer injunction statute, which requires the prepayment of taxes allegedly due or the posting of a bond as a prerequisite for an injunction, instead of the general injunction statute.[15] Tex. Tax Code Ann. Section 112.101 (1982).

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14. Tex. Tax Code Ann. Section 111.022 (Vernon 1982) entitled "Jeopardy Determination" states:

(a) If the comptroller believes that the collection of a tax required to be paid to the state or the amount of a determination is jeopardized by delay, the comptroller shall issue a determination stating the amount and that the tax collection is in jeopardy. The amount determined is due and immediately payable.

(b) A determination made under this section becomes final on the expiration of 20 days after the day on which the notice of the determination was served by personal service or by mail unless a petition for a redetermination is filed before the determination becomes final.

(c) If a determination made under this section becomes final without payment of the amount of the determination being made, the comptroller shall add to the amount a penalty of 10 percent of the amount of the tax and interest.

15. This section entitled "Requirements Before Injunction" states that:

(a) An action for a restraining order or injunction that prohibits the assessment or collection of a tax or fee imposed by this title or collected by the comptroller under any law, including a local tax collected by the comptroller, or a statutory penalty assessed for the failure to pay the tax or fee may not be brought against the public official charged with the duty of collecting the tax or fee or a representative of the public official unless the applicant for the order or injunction has first:

(1) filed with the attorney general not later than the fifth day before the date the action is filed a statement of the grounds on which the order or injunction is sought; and

(2) either:

(A) paid to the public official who collects the tax or fee all taxes, fees, and penalties then due by the applicant to the state; or

(B) filed with the public official who collects the tax or fee a good and sufficient bond to guarantee the payment of the taxes, fees, and penalties in an amount equal to twice the amount

In fact, the only authority available indicates that McQueen would not have to prepay any money to maintain his right to an administrative remedy while he litigates his federal constitutional claims. *Texas Alcoholic Beverage Commission v. Macha.*[16]

In *Macha*, the taxpayer claimed that the Texas Alcohol and Beverage Commission's (the "TACB") suspension of his liquor permits for failure to remit taxes allegedly due violated the Texas constitution's due process provision. The trial enjoined the suspension. On appeal, the TACB argued that the trial court erred in granting the injunction because it failed to require the taxpayer to prepay the taxes allegedly due or to post a bond under the taxpayer injunction statute. Tex. Tax Code Ann. Section 112.101. The court of appeals disagreed. The court stated that:

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of the taxes, fees, and penalties then due and that may reasonably be expected to become due during the period the order or injunction is in effect.

(b) The amount and terms of the bond and the sureties on the bond authorized by Subsection (a)(2)(B) must be approved by and acceptable to the judge of the court granting the order or injunction and the attorney general.

(c) The application for the temporary restraining order or injunction must state under the oath of the applicant or the agent or attorney of the applicant that:

(1) the statement required by Subsection (a)(1) has been filed as provided by the subsection; and

(2) the payment of taxes, fees, and penalties has been made as provided by Subsection (a)(2)(A) or a bond has been approved and filed as provided by Subsection (a)(2)(B) and Subsection (b).

(d) The public official shall deliver a payment or bond required by Subsection (a)(2) to the treasurer. The treasurer shall deposit a payment made under Subsection (a)(2)(A) into the suspense account of the treasurer.

16. 780 S.W.2d 939 (Tex. Civ. App. 1989).

> [s]ince the [trial] court's stay order does not prohibit the collection of a state tax, license, registration or filing fee, section 112.101 does not control on any of those bases.[17]

McQueen, like the taxpayer in *Macha*, has only requested due process. Neither McQueen nor the *Macha* taxpayer impugned the validity of the assessment on appeal. McQueen only claimed a right to a prompt post-deprivation hearing where a neutral administrative law judge could determine the probable validity of the Comptroller's assessments. The analogy between *McQueen I* and *Macha* thus demonstrates that Texas courts will not penalize McQueen for raising his due process claims by imposing a prepayment requirement through the taxpayer injunction statute. Texas law does not even whisper that the general injunction statute would not apply.

As we noted in *Dawson v. Childs*,[18] "Texas . . . 'has a vast arsenal to assure orderly adjudication of [ ] serious federal constitutional question[s] . . .'" *Dawson, supra*, at 710 (citing *City of Houston v. Standard Triumph Motor Co.*, 347 F.2d 194, 199 (5th Cir. 1965) *cert. denied*, 382 U.S. 974, 86 S. Ct. 539, 15 L.Ed.2d 466 (1966). The jurisprudence suggests no penalty for raising these claims. As such, Texas provides remedies which are, under the Tax Injunction Act, "plain," "speedy," and "efficient." Therefore, we may not extend jurisdiction over McQueen's claims.

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17. *Texas Alcoholic Beverage Commission v. Macha*, 780 S.W.2d at 941.

18. 665 F.2d 705 (5th Cir. Unit A, Jan. 1982).

IV. *McQUEEN II*: PROCEEDINGS BELOW

McQueen filed a complaint, an application for a temporary restraining order, and an application for a temporary injunction against the United States and the Comptroller in the Southern District of Texas. He claimed that the Comptroller based the January 1989 and February 1989 assessments on information obtained in violation of rule 6 of the Federal Rules of Criminal Procedure. According to McQueen, the grand jury assistants disclosed documents occurring before the grand jury to the IRS and the Comptroller. As a result, McQueen sought to enjoin: (1) further violations of rule 6; (2) the Comptroller and the IRS to return documents and information obtained from grand jury assistants in violation of rule 6; (3) the Comptroller from using the documents or information; and, (4) the Comptroller's assessments which were based on the documents or information.

The United States and the Comptroller opposed McQueen's application for a temporary restraining order and McQueen's application for a temporary injunction. They also moved to dismiss the complaint. The court denied the temporary restraining order and the temporary injunction and then granted the United States' motion to dismiss under rule 12(b)(6). The court stated that:

> Pending before the Court is Defendant United States of America's Motion to Dismiss. . . . The documents obtained by the federal government pursuant to a search warrant did not automatically become grand jury documents at the time they were disclosed to the Comptroller of the State of Texas. Because Rule 6(e) is not implicated by the agent's conduct, plaintiff's argument must fail.

The court did not decide the Comptroller's rule 12(b)(6) motion. McQueen appealed the court's dismissal of his claim against the United States.

V. *McQUEEN II:* DISCUSSION

[3-5] *McQueen II* must likewise be dismissed because we conclude that it is barred by the doctrine of sovereign immunity. Under the doctrine of sovereign immunity, the United States cannot be sued without its consent.[19] McQueen sued the United States for alleged violations of rule 6(e) of the federal rules of criminal procedure. Yet there are no statutes that even remotely suggest that the United States has consented to suit for rule 6(e) violations. Instead, the case law reveals that rule 6(e) must be enforced through contempt motions filed against the *individuals* subject to its admonitions.[26] McQueen

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19. *United States v. Mitchell*, 445 U.S. 535, 538, 100 S. Ct. 1349, 1351-52, 63 L.Ed.2d 607 (1980) ("It is elementary that 'the United States, as sovereign, is immune from suit save as it consents to be sued. . . . , and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit."); *United States v. Sherwood*, 312 U.S. 584, 586, 61 S. Ct. 767, 769-70, 85 L.Ed. 1058 (1941) ("The United States, as sovereign, is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit."); *A.I.T. Corp. v. Small Business Administration*, 823 F.2d 126, 127 (5th Cir. 1987) ("It is axiomatic that the United States is immune from suit and, if it consents to suit, that its consent waives its immunity only to the extent of the consent."); *Williamson v. United States Department of Agriculture*, 815 F.2d 368, 373 (5th Cir. 1987) (The doctrine of sovereign immunity "renders the United States, its departments, and its employees in their official capacities as agents of the United States immune from suit except as the United States has consented to be sued.").

20. *Bank of Nova Scotia v. United States*, 487 U.S. 250, 108 S. Ct. 2369, 2378, 101 L.Ed.2d 228, 243 (1988) ("For example, a knowing violation of Rule 6 may be punished as a contempt of court. *See* Fed. R. Crim. Proc. (6)(e)(2). In addition, the court may direct a prosecutor to show cause why he should not be disciplined and request the bar or the Department of Justice to initiate disciplinary

has opted for a procedure and for relief which is not available to him. Thus, sovereign immunity prevents review of McQueen's appeal against the United States.

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proceedings against him. The court may also chastise the prosecutor in a published opinion. Such remedies allow the court *to focus on the culpable individual* rather than granting a windfall to the unprejudiced defendant.") (emphasis added); *Blalock v. United States*, 844 F.2d 1546, 1551 (11th Cir. 1988) ("Thus in holding that a target may seek civil contempt sanctions for a violation of Rule (6)(e)(2), *Lance* stands for the proposition that a target may bring suit for injunctive relief against the individuals subject to Rule 6(e)(2) and may invoke the district court's contempt power to coerce compliance with an injunctive order the court grants. . . . Because *Lance* is binding, we must determine whether appellant had made out a case for injunctive relief against the prosecutor or any of the FBI agents. We do so notwithstanding that appellant had filed no suit against these individuals in the district court."); *In re Grand Jury Investigation (Lance)*, 610 F.2d 202, 213 (5th Cir. 1980) (action brought against government attorneys).

In this regard, we comment that McQueen also erred by suing the Comptroller instead of any specific individuals alleged to have made any disclosures. He could, however, have identified these individuals through the district court. Rule 6(e)(3)(B) states that "[a]n attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, [under rule 6(e)(3)(A)(ii)] with the names of persons to whom such disclosure has been made. . . . " Even though we do not have jurisdiction to entertain McQueen's appeal against the Comptroller, we have not contravened our precedent by making these comments. *See Jones v. Celotex Corp.*, 867 F.2d 1503, 1504 (5th Cir. 1989) (on petition for rehearing and suggestion for rehearing en banc) ("We note that the dismissal does not result in inequity to Jones. The facts in the record plainly support the judgment notwithstanding the verdict. Absent the jurisdictional defect, the judgment surely would have been affirmed."); *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1378 (5th Cir. 1980) ("Because some of the theories upon which the district court may have predicated its dismissal of . . . [the defendant] may also bear upon the disposition of the claims against the other defendants and because rule 54(b) explicitly renders even the order dismissing . . . [the defendant] still subject to revision by the district court, we shall, in the interest of expediency, proceed to offer that court some guidance in its further handling of these issues."); *In re Corrugated Container Antitrust Litigation v. Mead Corp.*, 614 F.2d 958, 960 n.1 (5th Cir. 1980) ("To dispose of the present matter solely on the issues of appealability and entitlement to a writ of mandamus might put to rest

VI. CONCLUSION

The Tax Injunction Act precludes exercise of our jurisdiction over the claims McQueen raised in *McQueen I*. The doctrine of sovereign immunity precludes our exercise of jurisdiction over *McQueen II*. In each case the dismissals must be affirmed.[21] AFFIRMED IN BOTH CASES.

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questions concerning the propriety of further involvement in the case by the district judge. Nevertheless, the extraordinary stakes involved here . . . and our experience with the progress of the litigation thus far convince us that ultimately appellate consideration of the issue of disqualification will likely be necessary. For those reasons we reach the merits of the contentions raised here.").

21. Because we lack jurisdiction to entertain either of these suits, we do not consider the plethora of motions McQueen filed subsequently to this appeal nor the multitude of new issues that these motions raise.

APPENDIX 2

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NOS. 89-1257 and 89-6146

ALVY THOMAS McQUEEN, Individually
and dba LIVINGSTON OIL, Plaintiff-Appellant,

v.

BOB BULLOCK, Comptroller,
in his official capacity, Defendant-Appellee.

NO. 89-6146

ALVY T. McQUEEN, Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, ET AL.,
Defendants-Appellees.

Appeals from the United States District Courts for the
Western and Southern Districts of Texas

ON PETITION FOR REHEARING

(September 14, 1990)

Before GOLDBERG, POLITZ and JONES,
Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED

ENTERED FOR THE COURT:

/s/ (Signature Illegible)
United States Circuit Judge

APPENDIX 3

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-1257

D. C. Docket No. 89 CV 165

ALVY THOMAS McQUEEN, Individually
and dba LIVINGSTON OIL, Plaintiff-Appellant,

v.

BOB BULLOCK, Comptroller,
in his official capacity, Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of Texas

(Filed September 27, 1990)

Before GOLDBERG, POLITZ and JONES,
Circuit Judges.

JUDGMENT

Thiis cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

August 9, 1990

ISSUED AS MANDATE: Sept. 25, 1990

APPENDIX 4

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 89-6146

D. C. Docket No. CA H 89 2112

ALVY T. McQUEEN, Plaintiff-Appellant

v.

UNITED STATES OF AMERICA, and
COMPTROLLER OF PUBLIC ACCOUNTS,
STATE OF TEXAS,
Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Texas

Before GOLDBERG, POLITZ and JONES,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

August 9, 1990

ISSUED AS MANDATE: September 25, 1990

APPENDIX 5

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL NO. A-89-CA-165

ALVY THOMAS McQUEEN,
Individually, and d/b/a LIVINGSTON OIL

v.

BOB BULLOCK

ORDER

Before the Colurt are the following motions in this matter: (1) Plaintiff's Application for Preliminary Injunction; and (2) Defendant's Motion to Dismiss and Alternative Motion to Abstain. In a previous Order, the Court denied the Plaintiff's request for a temporary restraining order. A hearing was held on these motions on February 23, 1989 and was continued on Februaiy 28, 1989. At the request of the parties, the evidence was left open until March 3, 1989, when one additional exhibit was submitted by the Plaintiff. It is the Court's understanding that the evidence is now closed, and these motions are ripe for decision. The Court has reviewed all of the evidence and argument presented at the hearings, as well as the voluminous briefs submitted by the parties, in addition to all of the pleadings on file in this case. Based upon this review, the Court is of the opinion that the Motion for Preliminary Injunction should be Denied, and the Motion to Dismiss should be Granted.

I. *BACKGROUND*

This matter arises out of two jeopardy tax assessments made against the Plaintiff by the Comptroller of Public Accounts of the State of Texas. The assessments are based upon allegedly unpaid fuel taxes. The first assessment was originally made in the amount of $75,973.00, but was later amended to the increased figure of $257,757.00. The second assessment, covering a longer period of time (37 months) was for approximately $7.8 million, which includes penalties and interest. Pursuant to the assessments, the Comptroller seized the Plaintiff's trailers and trucks, which the Plaintiff uses to conduct his business operations. The Comptroller also "froze" five bank accounts, which contained an aggregate sum of approximately $35,000.00. The Plaintiff alleges, and the Defendant does not dispute, that these seizures have made it impossible for him to conduct his business.

The Plaintiff filed this action alleging that the jeopardy tax assessment levies authorized by the Texas Tax Code are unconstitutional, because Texas law does not provide the taxpayer a prompt post deprivation hearing. He applied for a TRO and a preliminary injunction requiring that the Comptroller return the seized items, and refrain from making any further assessments against him. As noted earlier, the Court denied the request for a TRO in an Order dated February 17, 1989. The Comptroller has responded to the request for a preliminary injunction by arguing that the Court lacks the power to enter the injunction requested by the Plaintiff, or to hear this case, because of the terms of the Tax Injunction Act, 28 U.S.C. § 1341. Thus, the Comptroller requests that the Court deny the Application for Preliminary Injunction, and dismiss this case.

II. *DISCUSSION*

As the parties are aware, there are four traditional showings that an applicant for a preliminary injunction must make before he is entitled to relief:

(1) there is substantial likelihood that the movant will prevail on the merits of his claim;

(2) the movant will suffer irreparable injury if relief is not granted;

(3) the injury to the movant outweighs the potential harm the injunction will cause the respondent; and

(4) the injunction will not disserve the public interest.

Interox America v. PPG Industries, Inc., 736 F.2d 194, 198 (5th Cir. 1984). The Defendant's claim that this case may not go forward because the terms of the Tax Injunction Act go to the heart of the first element. The Tax Injunction Act is also the basis of the Defendant's Motion to Dismiss. Accordingly, the Court will discuss that matter first.

The Tax Injunction Act contains the following seemingly simple instruction:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. § 1341. There is no dispute that the tax at issue here is a "tax under State law," nor that granting Plaintiff the relief he requests would involve "enjoin[ing], suspend[ing] or restrain[ing] the assessment, levy or collec-

tion" of that tax. The issue the Court must decide, therefore, is whether the Plaintiff has a "plain speedy and efficient remedy" in the courts of Texas.

Fortunately, the Court is not writing on a clean slate in this area. Literally hundreds of cases define and expand upon the concept of "plain, speedy and efficient" remedies. In determining whether the state remedy is "plain, speedy and efficient," the Court need not find that the remedy is the best remedy available, or that it is equivalent to remedies available in federal court. *Bland v. McHann,* 463 F.2d 21, 29 (5th Cir. 1972). For the remedy to be adequate, it must provide a forum for the litigation of the asserted federal rights. *Tully v. Griffin, Inc.,* 429 U.S. 68, 73 (1976). The courts have also addressed state procedures that require pre-payment of the tax before the taxpayer can challenge the assessment. These courts have held that the pre-payment requirement does not destroy the plain, speedy and efficient character of the remedy. *Edwards v. Transcontinental Gas Pipe Line Corp.,* 464 F. Supp. 654, 659 (N.D. La. 1979). Likewise, courts have held that the taxpayer's inability to pay the tax does not mean the state remedy is not plain, speedy and efficient. *Wood v. Sargeant,* 694 F.2d 1159, 1161 (9th Cir. 1982). The court is to focus on the procedural aspect of the remedies available, and not on the particular circumstances of the aggrieved taxpayer. *See Rosewell v. LaSalle National Bank,* 450 U.S. 503, 512 (1981). The touchstone of the inquiry is whether the taxpayer, under state law, is entitled to a full hearing and judicial determination at which he can raise any constitutional objections he may have to the tax. *Id.* at 513-14.

The remedies available to the Plaintiff in this case are several. First, under the terms of the Texas Tax Code, the Plaintiff is entitled to bring suit in state court to chal-

lenge the tax, provided he prepays the tax. TEX. TAX CODE ANN. § 112.051 (Vernon 1982). Further, under the terms of TEX. TAX CODE ANN. § 122.101 (Vernon 1982). the Plaintiff is entitled to injunctive relief if he pays the amount of the tax into the State treasury. In lieu of paying the full taxes, the Plaintiff can post a bond in twice the amount of the tax. The Plaintiff also has available the remedy of section 111.022(b). That section authorizes that taxpayer who receives a jeopardy assessment (as here) to petition the Comptroller for an administrative redetermination of the assessment. The pendency of the administrative proceeding precludes the Comptroller from disposing of any seized assets. The Plaintiff has invoked his rights under this provision as they pertain to both the jeopardy assessments. Finally, it appears that the Plaintiff could pursue an action under the Texas Uniform Declaratory Judgments Act, TEX. CIV. PRAC. & REM. CODE ANN. § 37.004 (Vernon 1986), and seek the same relief he seeks in this Court. That Act has been used before to challenge tax assessments by the Comptroller. *Cobb v. Harrington,* 190 S.W.2d 709 (Tex. 1945). There does not appear to be any reason why the Plaintiff could not pursue his rights under that statute, and in the Texas courts.

The Plaintiff argues that none of the above remedies are plain, speedy or efficient under the facts of this case. He argues that any remedy that requires a prepayment of the tax is unavailable to him, given the huge size of the assessment. As noted earlier, however, a requirement that the taxpayer prepay the tax is not an impediment to the remedy being plain, speedy and efficient. *Edwards,* 464 F. Supp. at 659. Moreover, the Defendant pointed out that the Plaintiff can pursue his administrative right to a redetermination under section 111.022(b), and receive

back his equipment and accounts by payment of a bond in the amount of the value of the items seized. Defendants Supplemental Brief at 11-12. In this case, it appears that the amount of that bond would be $135,000.00 This is not an amount so large as to effectively prevent the Plaintiff from pursuing his remedies. Finally, the availability of an action for a declaratory injunction moots the issue of prepayment. There does not appear to be any reason why the Plaintiff would not be entitled to an injunction from a Texas court under that Act, nor is there any reason why he could not raise his constitutional arguments in such a proceeding.

II. *CONCLUSION*

In sum, the Court finds that the remedies available to Plaintiff in Texas courts are "plain, speedy and efficient" under the terms of the Tax Injunction Act. Accordingly, the Court lacks the jurisdiction to grant the preliminary or permanent injunctive relief requested by the Plaintiff, and this case must be dismissed on that basis. Because this decision resolves this matter, the Court will not address the remaining factors for consideration in a preliminary injunction setting, nor will it address the Plaintiff's remaining contentions.

ACCORDINGLY, IT IS ORDERED that the Plaintiff's Motion for Preliminary Injunction is DENIED. IT IS FURTHER ORDERED that Defendant's Motion to Dismiss is GRANTED, and this case is DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION.

SIGNED and ENTERED this 10th day of March, 1989.

JAMES R. NOWLIN
James R. Nowlin
United States District Judge

APPENDIX 6

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-89-2112

ALVY T. MCQUEEN,
Plaintiff,

v.

UNITED STATES OF AMERICA
AND COMPTROLLER OF PUBLIC
ACCOUNTS, STATE OF TEXAS,
Defendants.

ORDER

Pending before the Court is Defendant United States of America's Motion to Dismiss. Having read the motions, exhibits thereto and the applicable law, the Court finds that the motion to dismiss should be granted pursuant to Federal Rule of Civil Procedure 12(b)(6).

Defendant asserts that Federal Rule of Criminal Procedure 6(e) applies to evidence and/or documents that have been placed before the jury. In other words, once the documents have been presented to the grand jury, they cannot later be disclosed. The documents obtained by the federal government pursuant to a search warrant did not automatically become grand jury documents at the time they were disclosed to the Comptroller of the State of Texas. Because Rule 6(e) is not implicated by the agent's conduct, plaintiff's argument must fail.

[Plaintiff's motion for reconsideration is now MOOT.]

For the reasons stated herein, it is ORDERED that defendant's motion to dismiss be GRANTED.

SIGNED this 24th day of October, 1989.

KENNETH M. HOYT
Kenneth M. Hoyt
United States District Judge

APPENDIX 7

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CAUSE NO. A 89 CA 165

ALVY THOMAS MCQUEEN,
Individually and d/b/a LIVINGSTON OIL,
Plaintiff,

v.

BOB BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS,
in his official capacity,
Defendant.

COMPLAINT AND APPLICATION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Plaintiff Alvy McQueen, individually and d/b/a Livingston Oil ("Plaintiff") files this Complaint and Application for Temporary Restraining Order and Preliminary Injunction, complaining of and seeking to enjoin certain acts of the Comptroller of Public Accounts of the State of Texas ("the State" or "Comptroller"), and respectfully says:

1. Alvy Thomas McQueen is a resident of Polk County, Texas. Livingston Oil is a sole proprietorship of Alvy T. McQueen, with its principal place of business in Livingston, Texas.

2. Defendant Bob Bullock is the Comptroller of Public Accounts of the State of Texas, charged with the duty of determination, assessment and collection of motor fuel taxes. Defendent is sued in his official capacity. Service of process may be had on him in Travis County, Texas.

3. Jurisdiction of this action is founded upon 28 U.S.C. § 1331.

4. The injunctive relief sought herein is brought by Plaintiff pursuant to Rule 65 of the Federal Rules of Civil Procedure.

5. The Comptroller has deliberately and systematically entered upon a vendetta against Plaintiff in order to punish him in a manner and to an extent which the laws of the United States of America and the State of Texas do not permit. Plaintiff has thereby been denied the equal protection of the law and due process guaranteed to him with respect to actions taken by the State or in the guise of the public authority of the State. Examples of the egregious and special treatment of this citizen, thereby denying him the equal protection of the laws, is set forth in the following paragraphs.

6. The State of Texas, acting through the Attorney General, and the Plaintiff reached a settlement of outstanding tax liabilities for earlier periods. By February 1988, the payments required pursuant to the settlement were fully paid to the State of Texas. Accordingly, Plaintiff requested release of the tax liens that the State of Texas had imposed to enforce collection of the tax. The Comptroller refused to release the liens, despite the fact that there was then no tax liabilities assessed or asserted against Plaintiff. Upon information and belief, Plaintiff alleges that the Comptroller's policy and practice

applied to other citizens of the State of Texas is to release tax liens which have been compromised and paid and that that is the policy and practice contemplated by the laws of the State of Texas. Upon information and belief, Plaintiff alleges that the reason the State refused to release the liens, thereby damaging Plaintiff, was that the Comptroller had singled this citizen out for special treatment, thereby denying him the equal protection of the laws.

7. On June 23, 1988, the Comptroller made a jeopardy assessment against Plaintiff in the amount of $75,-973. The assessment gave no explanation or basis for the assessment. The jeopardy assessment purportedly justified the Comptroller's continuance of a tax lien, which had the effect of denying Plaintiff the power to deal with his property as he saw fit. On July 1, 1988, Plaintiff requested an explanation of the assessment pursuant to the Comptroller's own Rule 1.13 which required the Comptroller to give an explanation within 10 days of the request. For months, the Comptroller ignored his own rule and refused to give an explanation, all the while maintaining the jeopardy assessment and thereby causing damage to the Plaintiff. Upon information and belief, Plaintiff alleges that the Comptroller's policy and practice applied to other citizens of the State of Texas is to follow his own Rule 1.13 and to provide the required explanation within the 10 day period. Upon information and belief, Plaintiff alleges that the reason the Comptroller refused to provide the required explanation was that the Comptroller had singled this citizen out for special treatment, thereby denying him the equal protection of the laws.

8. On September 29, 1988, the Comptroller impounded one of Plaintiff's trucks, asserting initially that the truck failed to carry the manifest required by law. Upon delivery of the proper manifest, the Comptroller thereupon alleged that the manifest was defective because it did not contain proof that tax had been paid on the cargo. The Comptroller then was advised that his own rules, which set forth the information that must be contained in the manifest, contain no requirement that the manifest show proof of tax paid. The Comptroller nevertheless refused to return possession of the truck to Plaintiff until Plaintiff posted bond. Upon information and belief, Plaintiff alleges that the Comptroller's policy and practice is not to require all citizens who distribute motor fuels to carry on their trucks proof of tax paid, as evidenced by the fact that there is no public pronouncement of that alleged requirement, and that the action taken by the Comptroller to punish the Plaintiff for not carrying that proof had as its purpose and effect to single this citizen out for special treatment, thereby denying him the equal protection of the laws.

9. On or about January 25, 1989, the State of Texas, acting in principal part at the behest of the Comptroller, filed a pleading in the District Court for Travis County seeking to enjoin Plaintiff from operating as a distributor of motor fuels without a permit ("injunctive proceeding"). Upon information and belief and upon personal knowledge, Plaintiff alleges that, prior to this action by the Comptroller, the Comptroller had applied to all persons similarly situated to Plaintiff the interpretation that a permit is required only if a distributor purchases fuel tax-free under the various statutory exemptions. That interpretation is consistent with the design of the motor fuels tax provisions and, in any event, was consistently

applied to the citizens of this State. In the injunctive proceeding, the Comptroller changed his consistent and good faith interpretation of the permit requirement so that he could apply that new interpretation to only two citizens in this state — Plaintiff and one other that the Comptroller also apparently does not like. Based upon this new interpretation and an improper verification of facts by the Attorney General, the State of Texas succeeded in obtaining an injunction against Plaintiff, thereby putting him out of business. Upon information and belief, Plaintiff alleges that the Comptroller has not sought similar action against other distributors similarly situated and that the reason the Comptroller is attempting to apply this new interpretation to Plaintiff is that the Comptroller has singled this citizen out for special treatment, thereby denying him the equal protection of the laws.

10. On February 1, 1989, the Comptroller issued a jeopardy assessment against Plaintiff in an amount exceeding $7,000,000 and seized Plaintiff's assets including his tractors and trailers ("trucks") and cash deposits, all of which are necessary for him to conduct business. The Comptroller's exorbitant assessment, for which there is no proper basis, and the seizure of Plaintiff's trucks, thus preventing Plaintiff from selling or delivering motor fuel, have put Plaintiff out of business and are depriving him of his livelihood. If the Comptroller does not return Plaintiff's trucks in the immediate future, the losses Plaintiff will suffer will forever preclude him from reentering this business by which he earns his livelihood.

11. The facts and circumstances of the assessment and levy establish that they are a continuation of the Comptroller's extra-judicial and discriminatory application of the laws to this citizen. Upon information and

belief, Plaintiff alleges that the Comptroller's policy and practice is not to exact such draconian retribution against citizens of the State of Texas and that this citizen was singled out for special treatment, thus denying him the equal protection of the laws.

12. Furthermore, the State's jeopardy assessment and levy constitute a gross deprivation of Plaintiff's due process of law rights under the First and Fourteenth Amendments to the Constitution of the United States. The State of Texas provides no adequate, plain, speedy and efficient means by which Plaintiff may challenge the State's actions through a full hearing to obtain a judicial determination of the merits and constitutionality of those actions. The remedies provided a taxpayer by the Texas Tax Code (the "Code") to challenge the Comptroller's assessment, levy or collection of a tax are unavailable to Plaintiff as each "remedy" requires the prepayment of at least the amount of taxes assessed against Plaintiff before he can challenge the assessment's validity. Plaintiff cannot pay these taxes in this egregious amount. An unavailable remedy is not an adequate remedy.

13. Upon bare allegations of an exorbitant taxed owed —an allegation which Plaintiff, because of the prepayment requirement, effectively is precluded from challenging at all or, in any event, before he will suffer irreparable harm—the State not only has deprived Plaintiff of his livelihood, denied him his constitutional due process rights, and, as each day passes, further extinguishes the possibility of Plaintiff ever re-entering the only business he knows.

14. The Comptroller's actions had as their purpose and effect to improperly assist the State and, probably also the Federal Government in the parallel Federal

Grand Jury investigation, in making a criminal case against the Plaintiff by forcing him to waive his Fifth Amendment privilege by exacting such draconian action against him that, if he chose to contest that action in a civil proceeding, the Plaintiff would be required to give testimony in order to make his case. This action would be easily recognized as inappropriate if the State had called Plaintiff before a grand jury or at a criminal trial and offered him the choice of either testifying (thus potentially incriminating himself) or losing everything he had solely as a consequence of exercising his constitutional right not to testify. It is nonetheless inappropriate when the State forces that choice in the guise of a prohibitive jeopardy assessment and levy and other discriminatory action. Plainly this citizen is being improperly singled out for special treatment which denies him his Fifth Amendment right to avoid testifying against himself, denies him due process rights, and denies him the equal protection of the laws.

15. The deprivation of Plaintiff's ability to ever pursue his livelihood, the deprivation of Plaintiff's due process and equal protection constitutional rights, as well as the State's manipulation of Plaintiff by compelling him to a Hobson's choice between his constitutional rights and protections, each and all constitute an immediate and irreparable harm that Plaintiff will suffer if this injunction is not granted. Furthermore, this harm Plaintiff will suffer greatly outweighs any harm the State may allege it will incur if the injunction is granted. Finally, it is in the public's interest to protect a citizen's right to pursue his livelihood as well as to protect a citizen's constitutional rights and guarantees from gross infringements and violations by public officials.

16. Finally, Plaintiff's motion for an injunction is not barred by the Anti-Injunction Statute, 28 U.S.C. § 1341. § 1341 only prohibits district courts from enjoining, suspending or restraining the assessment, levy or collection of any tax under state law, where a *plain, speedy and efficient remedy may be had in the courts of such state.* The State of Texas, as discussed above, provides no plain, speedy and efficient remedy to Plaintiff in the state court. This conclusion would be compelled even in the absence of a jeopardy assessment and levy, but those actions taken without providing a prompt post-deprivation remedy confirm that the Anti-Injunction Statute is not a bar to injunctive relief.

17. In determining whether any security, or the amount thereof, will be required upon the Court's grant of Plaintiff's requested relief, Plaintiff urges this Court to consider that Plaintiff is asserting infringements of fundamental constitutional rights and that the Comptroller seized Plaintiff's assets, leaving him without the wherewithal to post a bond. Should this Court require a bond from Plaintiff, the Comptroller will have succeeded in barring Plaintiff from *all* possible methods of relief—even Plaintiff's access to the federal court system.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that this Court order the Comptroller to return Plaintiff's assets and cease violating Plaintiff's constitutional rights, order the Comptroller to cease making jeopardy assessments until and unless the legislation of Texas provides prompt post-deprivation court hearings, award Plaintiff damages to compensate for his losses incurred as the result of the State's unconstitutional seizure of his assets, award Plaintiff his damages for denial of due process, equal protection of the laws and other rights, award

Plaintiff reasonable costs and expenses incurred in prosecuting this action, including reasonable attorney's fees, and for such other and further relief, both general and special, at law and in equity, to which Plaintiff may be justly entitled.

Respectfully submitted,

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APPENDIX 8

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

NO. H-89-2112

ALVY T. McQUEEN,
Plaintiff

v.

UNITED STATES OF AMERICA AND COMPTROLLER OF PUBLIC ACCOUNTS,
STATE OF TEXAS
Defendants.

COMPLAINT AND APPLICATION FOR TEMPORARY RESTRAINING ORDER AND FOR TEMPORARY INJUNCTION

Alvy T. McQueen ("Plaintiff") hereby complains of the defendants described above (collectively "Defendants") and requests relief as follows:

Parties and Service.

1. Plaintiff is a citizen of the United States and the State of Texas and resides in Polk County, Texas.

2. Defendant United States of America is the government of the United States of America and may be served through the United States Attorney and the Attorney General as more particularly described in Rule 4(d)(4), Federal Rules of Civil Procedure.

3. The Comptroller of Public Accounts is an agency

of the State of Texas and may be served at 111 East 17th Street, Room No. 124, Austin, Texas.

Jurisdiction and Venue

4. This is an action to protect the integrity of the grand jury procedures by redressing certain illegal disclosures of matters occurring before the grand jury.

5. This action is brought pursuant to 28 U.S.C. Section 1331, Rule 6(e)(2), Federal Rules of Criminal Procedure, and the Court's inherent jurisdiction and power to protect its own processes from abuse.

6. To the extent the relief requested herein may affect state tax administration, the bar of the Anti-Injunction Act (28 U.S.C., Section 1341) is not applicable because that bar was not intended to deny federal courts the power to police and redress abuses of grand jury secrecy requirements, for there is no state court remedy which can properly redress an abuse of this Court's process.

Allegations on Merits.

7. This action seeks the redress of abuses of the secrecy requirements for matters occurring before a grand jury under the supervision of the United States District Court for the Southern District of Texas and the critical breaches of those secrecy requirements occurred within the Southern District of Texas; according by, venue in the Southern District of Texas is proper under 28 U.S.C. § 1391(b).

8. Since April 1988, Federal Grand Jury 87-2 (or a successor grand jury) ("Grand Jury") has conducted an investigation into whether certain persons have violated certain federal motor fuels tax laws under the Internal Revenue Code of 1986 and the Internal Revenue Code of 1954 (26 U.S.C.).

9. Plaintiff is one of the targets of the Grand Jury.

10. Suzy Wong ("Wong") and Mark W. Hughes ("Hughes") are persons permanently employed in the Criminal Investigation Division of the Internal Revenue Service.

11. Wong and Hughes are now and at all times relevant to this complaint have been assigned to assist the Grand Jury as agents of the Grand Jury in the investigation of Plaintiff and other targets of the grand jury investigation.

12. Commencing on or around September 20, 1988, and continuing for a number of days thereafter, Wong and Hughes allowed agents of the Comptroller of Public Accounts, State of Texas, to review and photocopy certain of the Plaintiff's documents.

13. The Plaintiff's documents which agents of Comptroller of Public Accounts reviewed and photocopied were in the possession of Wong and Hughes pursuant to their activity as agents of the Grand Jury.

14. The Plaintiff's documents which agents of the Comptroller of Public Accounts reviewed and photocopied were "matters occurring before the grand jury" under Rule 6(e)(3)(A), Federal Rules of Criminal Procedure.

15. Prior to making the disclosures alleged in Paragraphs 12 and 13, neither Wong nor Hughes nor any other agent or representative of the Grand Jury sought or received an order pursuant to Rule 6(e)(3)(C)(i) to authorize the disclosures.

16. Thereafter, the Comptroller of Public Accounts made a jeopardy assessment against Plaintiff in the

amount of $7,800,000+ and increased another jeopardy assessment against Plaintiff to $250,000+ based solely upon information and documents received from Wong and Hughes as alleged in Paragraphs 12 - 15.

17. Pursuant to the jeopardy assessments alleged in paragraph 16, on or around February 1, 1989, the Comptroller of Public Accounts levied upon and seized all of Plaintiff's assets and thereby rendered him incapable of conducting business and earning a living.

18. The levies and seizures and resulting damage to Plaintiff are based upon the jeopardy assessments by the Comptroller of Public Accounts which are in turn based solely upon information and documents received from Wong and Hughes as alleged in Paragraphs 12 - 15

19. Plaintiff has been severely and irreparably damaged and continues on an ongoing basis to be severely and irreparably damaged by the Comptroller's jeopardy assessments, levies and seizures based solely upon information and documents received from Wong and Hughes as alleged in Paragraphs 12-16; specifically, Plaintiff has been forced out of the only business he knows and has no income earning ability or other material sources for his cash needs to survive.

20. Upon information and belief, agents of the Grand Jury also permitted at least one civil agent of the Internal Revenue Service to review, analyze and photo copy at least the same grand jury materials made available to the Comptroller.

RELIEF REQUESTED

Wherefore, Plaintiff requests that this Court:

1. Enjoin further disclosures of Grand Jury materials and information in violation of Rule 6(e), Federal Rules of Civil Procedure;

2. Enjoin the Defendants from using or continuing to use (i) information and documents improperly disclosed by the Grand Jury or agents thereof in any manner not permitted by Rule 6(e), Federal Rules of Criminal Procedure, or (ii) any other documents or information discovered as a result of obtaining such information and documents;

3. Enjoin the Comptroller of Public Accounts to release the jeopardy assessments and liens based thereon and return to Plaintiff all of his property free and clear of all liens and encumbrances of or under the control of the Comptroller of Public Accounts;

4. Order the Defendant Comptroller of Public Accounts to return to the Grand Jury all documents and copies of documents which he obtained from the Grand Jury (or agents thereof);

5. Order the Internal Revenue Service, a branch of the United States, to return to the Grand Jury all documents and copies of documents which it obtained from the Grand Jury (or agents thereof);

6. Issue an appropriate Temporary Restraining Order and Temporary Injunction pending trial on the merits;

7. Assess direct, consequential and punitive damages against the Defendants for improper disclosure and/or use of Grand Jury information and materials; and

8. Grant such other and further relief as justice may require.

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(2)

NO. 90-965

Supreme Court of the United States

OCTOBER TERM, 1990

ALVY T. McQUEEN, *PETITIONER*

V.

COMPTROLLER OF PUBLIC ACCOUNTS, *RESPONDENT*

ALVY T. McQUEEN, *PETITIONER*

V.

UNITED STATES OF AMERICA, AND
COMPTROLLER OF PUBLIC ACCOUNTS,
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT, COMPTROLLER OF PUBLIC ACCOUNTS OF TEXAS

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QUESTIONS PRESENTED

1. Whether Petitioner made a *prima facie* showing of improper disclosure of grand jury material necessary to warrant an evidentiary hearing, and, if so, whether the disclosure constitutes "matters occurring before the grand jury" within the meaning of Rule 6(e), Federal Rules of Criminal Procedure.

2. Whether the Tax Injunction Act, 28 U.S.C. §1341, bars federal court jurisdiction over a suit to enjoin the Comptroller of Public Accounts of Texas from issuing a jeopardy assessment until Texas enacts legislation providing prompt post-deprivation court hearings without pre-payment requirement, where Texas courts have not been afforded the opportunity to rule on Petitioner's constitutional claims, there being no authority that such state courts would refuse to hear Petitioner's claims, and in fact, there being authority to the contrary.

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all parties.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

CONSTITUTION

STATUTES

RULES

NO. 90-965

Supreme Court of the United States
OCTOBER TERM, 1990

ALVY T. McQUEEN, *PETITIONER*

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COMPTROLLER OF PUBLIC ACCOUNTS,
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ALVY T. McQUEEN, *PETITIONER*

V.

UNITED STATES OF AMERICA, AND
COMPTROLLER OF PUBLIC ACCOUNTS,
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT, COMPTROLLER OF PUBLIC ACCOUNTS OF TEXAS

The Respondent, Comptroller of Public Accounts of Texas, respectfully requests the Court to deny the Petition for Writ of Certiorari seeking review of the decision of the Fifth Circuit Court of Appeals reported at 907 F.2d 1544.

STATEMENT OF FACTS

On June 2, 1988, tax auditors for the Comptroller of Public Accounts ("Comptroller") met with Petitioner to begin a motor fuels tax audit of his fuel distribution enterprise.[1] The first of the two jeopardy tax assessments at issue was for diesel fuel taxes for the one-month liability period of February, 1988. This assessment, dated June 23, 1988, was in the amount of $73,953.00 (Vol. 3, P. 492) and was based upon records obtained from third parties.[2] In September of 1988, these auditors learned that the Internal Revenue Service ("IRS") had obtained possession of certain of Petitioner's business records. Auditor McKinzie was allowed to review and copy certain business records at the IRS office in Houston, Texas. The documents he reviewed were represented to be ones seized pursuant to a search warrant issued in connection with an IRS investigation of Petitioner's fuel distribution enterprise. McKinzie was told that the records were separate and apart from certain grand jury documents that were strictly off limits. Based upon an audit of these records, the Comptroller increased the first assessment to $257,757.00 on January 16, 1989 (Vol. 2, P. 295), and on February 1, 1989, issued

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[1] See, Testimony of Michael C. McKinzie, one of the auditors involved, at Vol. 3, P. 60, l. 14-23. At press time, the Court had not requested the record. Respondent's record cites are to the record in Number 89-6146, the latter of the two cases coordinated for appeal by the Fifth Circuit.

[2] The record contains an affidavit from Petitioner's counsel, together with several exhibits which is loose in the file (noted at Vol. 2, P. 370). Attached to this affidavit (hereinafter "Townsend Affidavit") at Exhibit 19 is an informal transcript of portions of an administrative hearing pertaining to the two assessments at issue. At P. 7 of this informal transcript is testimony of the second auditor stating that the original assessment was based upon third-party records, and at P. 30 he identifies the sources of this information as Joe G. Tarrant and Allied Transportation Companies.

a second jeopardy assessment in the amount of $7,805,212.59 for the 35-month period of January, 1985 through January of 1988. This second jeopardy assessment was accompanied by a physical seizure of the assets of Petitioner's business.

Comptroller investigators were previously informed that Petitioner's business records were being secreted and removed out of Texas. (See, Testimony of Thomas John Huebner, counsel to the Enforcement Division of the Comptroller, at Vol. 4, P. 89). The records McKinzie reviewed were those obtained by the IRS pursuant to a federal search warrant served on June 18, 1988 in Grand Junction, Colorado.[3]

Petitioner at first filed a request for an administrative redetermination hearing for the February 1988 tax assessment prior to it being increased. By doing so, he chose not to seek a judicial determination of his claims provided by TEX.TAX CODE ANN. 112.051, et seq. (Vernon 1982), providing for the recovery of tax payments made under protest. According to the Comptroller's auditor, Petitioner's records obtained from the IRS established that Petitioner sold up to 3,000,000 gallons of diesel fuel[4] per month in the months immediately prior to the first assessment. Petitioner also filed a request for an administrative redetermination hearing of the 36-month audit jeopardy assessment that prompted the seizure of his business assets.

On February 14, 1989, Petitioner filed a Complaint and Request for Temporary Restraining Order and Pre-

[3] See, Townsend Affidavit, Exhibit 1, being a copy of the search warrant

[4] See, Testimony of Michael C. McKinzie, Vol. IV, pg. 81. This volume of sales would yield Petitioner $450,000 in fuel tax collections each month. Petitioner distributed an average of 1.13 million gallons monthly during the audit period.

liminary Injunction in the U.S. District Court for the Western District of Texas, Austin Division, seeking: (1) a return of his assets; (2) injunctions against the Comptroller from "violating Plaintiff's constitutional rights" and from making jeopardy assessments until legislation is enacted to provide "prompt post-deprivation court hearings"; for money damages and attorney's fees. (See, Petition, Appendix 7, P. 35a). This request for a temporary restraining order was denied February 17, 1989, without oral argument. On February 23, 1989, his Request for a Preliminary Injunction came on for hearing, and was continued until February 28, 1989, to allow him sufficient time to procure additional desired witnesses. On this second occasion the court received testimony from Michael C. McKinzie, the auditor performing the 36-month audit, and from three state attorneys regarding the events leading up to the assessments and seizure. Petitioner did not testify, nor offer any evidence in support of his request for a preliminary injunction. Petitioner, through his attorney, asserted a Fifth Amendment privilege and sought to prove his contentions via a "proffer", consisting of an undocumented statement, which Petitioner's attorney read into the record. (Vol. 4, P. 20 - 21). Petitioner's counsel stated that Petitioner's net worth "does not exceed $500,000." Petitioner presented no evidence that he was unable to prepay the one month assessment (then totalling $257,757) in order to obtain a judicial hearing of his complaints in state court. On March 10, 1989, the District Court granted the Comptroller's motion to dismiss. The court noted that Petitioner had available several state court remedies which were "plain, speedy, and efficient" within the meaning of 28 U.S.C. §1341 as to bar assertion of subject matter jurisdiction over the dispute. The court specifically found that Petitioner could receive back items seized after posting a bond in the amount of $135,000, which the court found "not an amount so large as to effectively prevent the Plaintiff from pursuing his remedies." (See, Petitioner's Appendix 5, P. 25a). Petitioner pursued an appeal to the U.S. Court of Appeals for the Fifth Circuit, No. 89-1257 (*"McQueen I"*),

which was argued October 4, 1989.

Meanwhile, after giving notice of appeal in *McQueen I*, Petitioner on June 20, 1989, filed suit in the U.S. District Court for the Southern District of Texas, Houston Division, against the United States of America and the Comptroller of Public Accounts, based on alleged violations of FED.R.CRIM.P. 6(e). That same day the court denied Petitioner's request for a temporary restraining order. On October 24, 1989, the court granted the United States of America's motion to dismiss, finding that Rule 6(e) is not implicated by the agents' conduct. (See, Petitioner's Appendix 6, P. 26a). Petitioner gave notice of appeal on October 26, 1989, (*"McQueen II"*). This appeal was coordinated by the Fifth Circuit with *McQueen I*, and argued June 6, 1990. On August 9, 1990, the Fifth Circuit affirmed the District Courts in both *McQueen I* and *McQueen II*, which is reported at 907 F.2d. 1544.

REASONS WHY THE PETITION SHOULD BE DENIED

1. THE RECORD DOES NOT RAISE THE ISSUES PRESENTED.

A. *McQUEEN II.*

The record below does not show that "matters occurring before the grand jury" were improperly disclosed, nor does it show that the documents obtained from federal employees - Petitioner's business records - were subject to the rule of secrecy. Given these facts, it is very unlikely that the Court would reach the issue presented in Question No. 1.

FED.R.CRIM.P. 6(e), is intended only to protect disclosure of what is said or what takes place in the grand jury room. *United States v. Interstate Dress Carriers, Inc.*,

280 F.2d 52, 54 (2nd Cir. 1960). The District Court correctly noted that Rule 6(e) is not implicated unless documents that are actually presented to the grand jury are disclosed.[5] When documents or other material will not reveal what actually transpired before the grand jury, their disclosure is not violative of the rule of secrecy. *Anaya v. United States*, 815 F.2d 1373, 1378-79 (10th Cir. 1987). The record clearly shows that IRS personnel went to great lengths to keep grand jury documents separate and apart from the business records disclosed to the auditor. (See, testimony of Michael C. McKinzie at Vol. 4, P. 67, 68).

Another compelling reason for denying the petition is that the documents reviewed by the auditor are not otherwise subject to the rule of secrecy embodied in Rule 6(e). The record is clear and Petitioner admits that the documents obtained were business records pertaining to Petitioner's purchases and sales of diesel fuel and gasoline.[6] The documents obtained by the Comptroller auditor were created for an independent business purpose, not directly related to the prospect of a grand jury investigation. Even if a grand jury had subpoenaed these documents, that fact would not insulate them from investigation in another forum. *See, SEC v. Dresser Industries, Inc.*, 628 F.2d 1368, 1383 (D.C. Cir. 1980), cert. denied, 449 U.S. 993, 101 S.Ct. 529, 66 L.Ed.2d 289, (1980). The District Court, correctly noting that the documents in question were never presented to the grand jury, properly dismissed Petitioner's complaint. The Fifth Circuit properly affirmed since Petitioner wholly failed to make a prima facie case of improper grand jury disclosure. *In re: Grand Jury Investigation (Lance)*, 610 F.2d 202, 216-17 (5th Cir. 1980).

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[5] See, Appendix I, the District Court's first order denying Plaintiff injunctive relief. After a motion for clarification, the court rendered the order contained in Petitioner's Appendix IV.

[6] Townsend Affidavit, Exhibit 1, being the search warrant with attached description of property to be seized.

Disclosure of information obtained from a source independent of the grand jury, such as a prior government investigation, does not violate Rule 6(e). Id. at 217.

Another reason why the Court is unlikely to reach Petitioner's Question No. 1 lies in the fact that the Comptroller auditors acted in good faith, having been told that the documents in question were not grand jury documents. Consequently, suppression would promote neither judicial integrity nor deter future misconduct. *LTV Education Systems, Inc. v. Bell*, 862 F.2d 1168 (5th Cir. 1989). In that case, the appellant argued that this court's decision in *United States v. Sells Engineering, Inc.*[7] should be applied retroactively, making improper a Rule 6(e) disclosure order relied upon in good faith by the civil division of the Department of Justice. The Fifth Circuit, noting that the facially valid Rule 6(e) order was relied on in good faith, found that suppression would not promote judicial integrity nor deter future misconduct by law enforcement officials, citing *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

B. McQUEEN I

Petitioner's claim that the Texas taxpayer remedies scheme denies him due process of law depends upon his assertion of inability to pre-pay the assessment in order to obtain a judicial hearing. (See, Petition, P. 6 and 33a.). He sought to establish this in the trial court via a "proffer" read into the record by his counsel.

Petitioner's counsel stated in this "proffer" that McQueen's net worth did not exceed $500,000. This does not establish McQueen's inability to pre-pay either the original assessment for February, 1988 ($73,953) or the increased assessment for this period ($257,757). It also

[7] 463 U.S. 418, 103 S.Ct. 3133, 77 L.Ed.2d 743 (1983).

failed to establish that he could not afford a $135,000 bond to get back his seized property.

2. THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF THIS COURT, NOR IS THERE ANY IRRECONCILABLE CONFLICT OF AUTHORITY IN DIFFERENT CIRCUITS

A. McQUEEN II

Petitioner claims that the Court of Appeals decision contravenes this Court's holding in *United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1983), by holding that a district court is powerless to remedy illegal (as opposed to legal, albeit erroneous) access to grand jury materials.[8] The Court of Appeals specifically held that Rule 6(e) must be enforced through contempt motions filed against the individuals subject to the Rule. *McQueen v. Bullock*, 907 F.2d 1544, 1520 (5th Cir. 1990), at n.20. This holding does not, as Petitioner suggests, contravene this Court's holding in *Sells Engineering*.

Petitioner overstates footnote 6 of the Court's opinion in *Sells Engineering* as an endorsement of the Ninth Circuit's pronouncement that "the district court shall take such steps as are, in its discretion, necessary to protect the Appellant's from the effects of past disclosure." *In re Grand Jury Investigation No. 78 - 184 (Sells, Inc., et al.)* 642 F.2d 1184, 1192 (9th Cir. 1981). This Court adopted a much more restrained pronouncement of the Ninth Circuit in the footnote cited by Petitioner:

> We cannot restore the secrecy that is already been lost but we can grant partial relief by preventing further disclosure. *In re Grand Jury Investigation 78 - 184 (Sells, Inc.)*, 642 F.2d at 1187 - 1188.

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[8] See Petition, P. 11

The Court declined to hold that a grand jury subject or target may obtain general injunctive relief other than against the individual subject to the admonitions of Rule 6(e). The court on this occasion should similarly decline to address this issue because no irreconcilable conflicts exists among the circuits.

In *Matter of Special March 1981 Grand Jury*, 753 F.2d. 575 (7th Cir. 1985), the Seventh Circuit adopted the position of the Ninth Circuit *In re: Grand Jury Investigation No. 78 - 184 (Sells, Inc.)*, but only in order to decide the issue of standing. *Matter of Special March 1981 Grand Jury*, 753 F.2d at 577. The court, noting that the grand jury material constituted business records not constituting "matters occurring before the grand jury", found that the U. S. Attorney was free to turn over the records to state authorities. The court noted that by not making copies of the business records prior to turning them over to the grand jury in response to its subpoena, the Appellants attempted to put the records into "perpetual cold storage."[9] 753 F.2d at 578. The Court further noted that the Appellant had alternative remedies against the state's unauthorized use of the records, which Petitioner also enjoys. Petitioner has the opportunity to suppress illegally obtained evidence in the criminal proceedings in state court, and has sought this relief. In this regard, granting certiorari does not change the result of this case. He already has remedies for his complaints.

B. *McQUEEN I.*

Petitioner claims that his state court remedies are uncertain because he may not obtain general injunctive

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[9] Petitioner attempted the same ploy. The Assistant U.S. Attorney offered to allow Petitioner's counsel access to the business records to copy them, but was informed by letter that Petitioner had withdrawn his counsel's authority to receive those documents. See, Townsend Affidavit, Exhibit 23.

relief without posting bond in a prohibitive amount. (See, Petition, P. 22 - 24). Petitioner complains for the first time that TEX.TAX CODE ANN. 112.108[10] prohibits injunctive relief against the Comptroller other than via the pre-payment or double bond provisions of the Texas Tax Code. Although Petitioner is barred from challenging the decision of the Court of Appeals on the basis of this provision due to his failure to raise it below,[11] the decision of the District Court and Court of Appeals in *McQueen I* would be no less clearly correct.

The District Court made the proper inquiry into the "plain, speedy, and efficient" nature of the Texas remedies. (See, Petition, Appendix 5, P. 23a - 25a). To be adequate, the Texas remedies need not be equivalent to the remedies available in federal court[12], but only need to provide a forum for the litigation of the asserted federal rights. *Tully v. Griffin, Inc.*, 429 U.S. 68, 73 (1976). Prepayment requirements do not destroy the plain, speedy and efficient character of the state remedies. *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 512 (1981).

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[10] Added by Acts 1989, 71st Leg., Chap. 232, § 16, effective September 1, 1989.

[11] *E.E.O.C. v. Federal Labor Relations Authority*, 476 U.S. 19, 24, 106 S.Ct. 1678, 1681, 90 L.Ed.2d 19 (1986), citing *FTC v. Grolier, Inc.*, 462 U.S. 19, 23, n.6, 103 S.Ct. 2209, 2212, n.6, 76 L.Ed.2d 387 (1983); and *Rogers v. Lodge*, 458 U.S. 613, 628, n.10, 102 S.Ct. 3272, 3281, 73 L.Ed.2d 1012 (1982).

[12] Petitioner claims that the Tax Injunction Act does not bar federal jurisdiction here because Texas has failed to enact specific legislation providing for a prompt post-seizure hearing. See, Petition, P. 29. By contrast, he reasons, Congress "sought help from the best minds in the country" to draft § 7429, Internal Revenue Code of 1986. Petitioner's inescapable conclusion is that Texas' failure to do so constitutes fatal indifference. As Respondent will show, a review of Texas jurisprudence shows that the due process rights of aggrieved taxpayers are alive and well on the frontier.

The Fifth Circuit confirmed its earlier decisions upholding the jurisdictional bar of the Tax Injunction Act because of the "vast arsenal" of remedies available to Texas taxpayers to assure orderly judication of serious federal constitutional questions. *McQueen v. Bullock*, 907 F.2d at 548, citing *Dawson v. Childs*, 665 F.2d 705, 710 (5th Cir. Unit A, 1982) and *City of Houston v. Standard Triumph Motor Co.*, 347 F.2d 194, 199 (5th Cir. 1965), *cert. denied*, 382 U.S. 974, 86 S.Ct. 539, 15 L.Ed.2d 466 (1966). At the outset, the court below pointed out that the authority of a Texas trial court to issue an injunction to protect McQueen from irreparable injury is provided by the Texas Constitution. *McQueen*, 907 F.2d at 1548, n.12; TEX.CONST. art. V, §8. Even if Petitioner had properly raised the applicability of §112.108 (referred to by Petitioner as the "Texas Anti-Injunction Statute"), his argument is undercut by the fact that a Texas trial court's authority to issue injunctive relief is constitutional and does not depend on the whim of the Texas Legislature. A similar situation confronted this Court in *Tully v. Griffin*.[13] This Court, providing guidance for the court below, found that the general injunction statute would provide a basis for preliminary injunctive relief based upon state cases providing such relief when constitutional grounds are urged.[14]

[13] See, 429 U.S. 68, 73 at n.6. The New York tax laws similarly provided that no injunctive or declaratory relief was available outside the remedial scheme provided by New York law.

[14] In making this point during oral argument, Respondent's counsel pointed out footnote 7 of the *Tully* decision recognizing that the New York Attorney General, while acknowledging a New York Court's power to issue a preliminary injunction, remained free to oppose the granting of such relief in any particular case. Petitioner misconstrues these comments at P. 26 of his petition to state that if the remedy was reasonably certain then Respondent's counsel could not have responsibly reserved the right to argue in State court that the remedy is not available. Petitioner misapprehends the statement in footnote 7 of *Tully*. Although acknowledging a Texas court's *power* to issue a preliminary injunction under appropriate circumstances, the Attorney General of Texas remains free to oppose the granting of such

(Footnote continued on next page)

Petitioner bypassed Texas courts and has attempted to argue that the Texas courts would not hear his claims. In doing so, he has asked the Court to hold the Tax Injunction Act inapplicable on the mere speculation that the Texas courts would not allow him injunctive relief for his federal constitutional claims. (See, Petition, P. 24). This Court, in the recent case of *Franchise Tax Board of California v. Alcan Alumnium*, 110 S.Ct. 661 (1990), held that the taxpayer must demonstrate that his remedy is uncertain. 110 S.Ct. at 667. Where no state court decision refusing to hear the taxpayer's claim exists, the court must sustain the jurisdictional bar of the Tax Injunction Act rather than hold it inapplicable on mere speculation that the state court would not allow the taxpayer to raise his constitutional arguments. *Ibid.*

Petitioner struggles to find such contrary state authority in the lone case of *Dub Shaw Ford, Inc. v. Comptroller of Public Accounts*, 479 S.W.2d 403 (Tex.Civ.App. - Austin 1972, no writ). (See, Petition, pg. 25, 26). *Dub Shaw Ford, Inc.* held that a taxpayer who elects to proceed with an administrative redetermination is required first to exhaust such administrative remedy before suing for a declaratory judgment. The court raised the issue of whether a declaratory judgment remedy is still available given the creation of the administrative tax tribunal and statutory administrative remedies.[15] However,

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(Footnnote continued from previous page)
relief to Petitioner. Such relief would be inappropriate *in this particular case* because Petitioner failed to demonstrate inability to pay or post bond. Accordingly, there is no factual support for his constitutional arguments, and the Texas Attorney General would so argue before a Texas trial court.

[15]Petitioner may have overlooked *Dub Shaw Ford, Inc.* and painted himself into a corner by requesting a redetermination on the initial one month assessment in the amount of $73,953 rather than immediately suing for declaratory and injunctive relief in state court. The other possibility is that Petitioner has rested his entire case on this flimsy dicta from the outset.

the court specifically declined to rule on whether these alternative remedies outside the Texas Tax Code are available.[16] This passing comment is insufficient to disregard the intention of Congress "to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes."[17] Petitioner's interpretation of this dicta conflicts with longstanding Texas precedent that such relief is available notwithstanding the taxpayer remedial scheme. For example, in *Cobb v. Harrington*, 190 S.W.2d 709 (Tex. 1945), the Texas Supreme Court held that the protest suspense statute does not prevent a taxpayer from bringing a declaratory judgment action to determine whether the Comptroller could legally demand the tax at issue. While upholding the validity of the suspense statute, the court held it was not made exclusive (as the *Dub Shaw Ford, Inc.*, dicta suggests) by the administrative remedies created by Texas tax statutes (now in the Texas Tax Code):

> The suspense statute is not of that kind. It applies *in general* to any occupation, gross receipt, franchise, license or privilege tax or fee required to be paid any state official and authorizes suit in any court of competent jurisdiction in Travis County. 190 S.W.2d at 714.

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[16] "However in the case at bar we need not decide whether the alternate remedies discussed above are available. The question before us has narrowed to a consideration of the doctrine of exhaustion of administrative remedies." 479 S.W.2d at 406.

[17] *McQueen v. Bullock*, 907 F.2d 1544, 1547 (5th Cir. 1990) at fn. 8, citing *Franchise Tax Board of California v. Alcan Alumnium*, 110 S.Ct. 661, 666, 107 L.Ed.2d 696, 705 (1990); *California v. Grace Brethren Church*, 457 U.S. at 409, 102 S.Ct. at 2508; and *Rosewell v. City of LaSalle National Bank*, 450 U.S. at 522, 101 S.Ct. at 1233 - 34.

This distinction squares with previous decisions of the Texas Supreme Court. In *Rogers v. Daniel Oil and Royalty Company*, 110 S.W.2d 891 (Tex. 1937), the court upheld the validity of the suspense statute as an exclusive remedy, but nonetheless affirmed the granting of temporary injunctive relief on principles of equity. The Texas Supreme Court held that the suspense statute was not "complete and adequate" insofar as it required the taxpayer to institute a multiplicity of protest suits because of his ongoing oil production activities. Accordingly, equity would intervene to grant injunctive relief to meet the needs of justice. 110 S.W.2d at 895, 896.

Additionally, Texas courts have fashioned remedies to protect vested property rights adversely affected by the action of an administrative body so as to invoke the protection of the due process clause of the Texas constitution. In *Brazosport Savings and Loan Association v. American Savings and Loan Association*, 342 S.W.2d 747 (Tex. 1961), the Texas Supreme Court held that when a vested property right has been adversely effected by the action of an administrative body so as to invoke the protection of due process, an inherent right of appeal has been recognized by Texas courts. This doctrine has been utilized in a multitude of situations to provide due process relief, oftentimes with additional injunctive relief to prevent irreparable injury. *See, e.g., Martine v. Board of Regents, State Senior Colleges of Texas*, 578 S.W.2d 465 (Tex.Civ.App. - Tyler 1979), relief granted and affirmed after remand, 607 S.W.2d 638 (Tex.Civ.App. - Austin 1980, writ ref'd n.r.e.).

Additionally, as this Court recently noted in *Pennzoil v. Texaco*, 107 S.Ct. 1519 (1987), the Texas Constitution contains an open courts provision[18] guaranteeing a right of action in Texas courts to protect due process rights. As in

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[18] TEX.CONST. art. I, § 13 provides: "All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law."

Pennzoil Co., Inc. v. Texaco, Inc., the Court must assume that state procedures will afford an adequate remedy in the absence of unambiguous authority to the contrary, where Petitioner has not attempted to present his federal claims in state court. 107 S.Ct. at 1528. To do otherwise, as Petitioner urges, would be to improperly assume that state judges will interpret ambiguities in state procedural law to bar presentation of federal claims. Ibid.

The case of *Texas Alcoholic Beverage Commission v. Macha*, 780 S.W.2d 939 (Tex.App. - Amarillo 1989, writ denied), cited by the court below[19], is an example of the availability of due process relief to Texas taxpayers. In *Macha*, the court held that TEX.TAX CODE ANN. 112.101 (Vernon 1982) does not - as Petitioner contends - prevent a trial court from granting an injunction on equitable grounds. The taxpayer claimed that the suspension of his liquor permits for failure to remit taxes allegedly violated the Texas Constitution's due process clause. The trial court enjoined the commission from suspending the permits and the Court of Appeals affirmed. The Fifth Circuit analogizes McQueen's grievance to that of the taxpayer in *Macha*: both only requested due process without impugning the validity of the underlying assessment. The Court of Appeals correctly concluded that "Texas law does not even whisper that the general injunction statute would not apply." 907 F.2d. at 1550.

The wisdom of the court below and its knowledge of Texas procedural law pertinent to this case is shown by decisions of the Austin Court of Appeals[20] subsequent to the decision below. That court recently confirmed the availability of the *Cobb v. Harrington* - type declaratory judgment to challenge the validity of a tax in *Bullock v.*

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[19] 907 F.2d at 1549.

[20] See Petitioner's footnote 9 extolling the special expertise of this tribunal.

Marathon Oil Co., 798 S.W.2d 353, 359-361 (Tex.App. - Austin 1990, no writ). It affirmed a trial court ruling that the state is not immune from suit outside taxpayer remedial scheme in Chapter 112 of the Texas Tax Code, contrary to Petitioner's assertions.[21] Earlier, in *Hammerman & Gainer, Inc. v. Bullock*, 791 S.W.2d 330, 331 (Tex.App. - Austin 1990, no writ), it again cited *Cobb* for the proposition that the Texas Tax Code's waiver of immunity is not exclusive and that declaratory relief was available since the taxpayer did not seek a refund, but sought to challenge the validity of the tax. In footnote 1 of that opinion the court notes that its decision is not controlled by §112.108 (the "Texas Anti Injunction Act"), which took effect after the signing of the judgment. Even so, this provision by its terms only purports to bar injunctive and declaratory relief insofar as the constitutionality *of the tax*[22] and not the *process*[23] by which the tax is administered. It only seeks to impose a pre-payment requirement to challenge constitutionality of a tax. It does not, as Petitioner suggests, seek to bar challenge to the *process* by which taxes are administered absent pre-payment.

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[21] See Petition, P. 26, citing *Contran Corp. v. Bullock*, 567 S.W.2d 616 (Tex.Civ.App. - Austin 1978, no writ). *Contran* merely holds that a taxpayer may not maintain a suit for refund unless he complies with the statutory requirement of accompanying this protest payment with a specific statement of his contentions. TEX.TAX CODE ANN. §112.051.

[22] For example, the kind of complaint raised by the taxpayer in *Bullock v. Texas Monthly*, 489 U.S. 1, 109 S.Ct. 890, 103 L.Ed.2d. 1 (1989), challenging the sales tax on First Amendment grounds.

[23] For example, the kind of complaint raised by the taxpayer in *Commissioner of Internal Revenue v. Shapiro*, 424 U.S. 614 (1976). Petitioner, unable to find a specific legal rule in Texas jurisprudence exactly stated like the exception in *Enochs v. Williams Packing Co.*, 370 U.S. 1 (1962), overlooks a forest of remedies around him.

The judicial climate for Petitioner's due process rights is unchanged from the time of the pronouncement of the distinguished jurist, Judge John R. Brown, writing for the Fifth Circuit in *City of Houston v. Standard - Triumph Motor Co.*:

> The record is plain. The remedies available in the State Courts of Texas are plain, speedy and efficient, and altogether complete. Nothing the Federal Court can grant by way of declaratory judgment or otherwise afford to this Importer a single right which it may not assert with confidence in the Courts of Texas. 347 F.2d. at 200.

In making this pronouncement, Judge Brown (like Judge Goldberg below) noted that this confidence was undeniably justified by recent decisions of Texas courts.[24] In due course, Texas courts will rule upon the issues raised by Petitioner, including the alleged conflict between federal due process rights and the recently-enacted TEX.TAX CODE ANN. §112.108 ("the Texas Anti-Injunction Act"). But unless the courts of Texas should betray the confidence of the federal judiciary by rendering decisions not protecting the due process rights of aggrieved taxpayers, McQueen's petition, and others like it, should be denied.

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[24] *Id.* at 200, Fn. 15:

> Within the very recent past in determining cases in which Federal Three-Judge District Courts have entered abstention orders, Texas courts have held Texas statutes invalid under the federal constitution. (Citations omitted)

CONCLUSION

For reasons stated above, the Petition for a Writ of Certiorari should be denied.

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(3)

No. 90-965

In the Supreme Court of the United States

OCTOBER TERM, 1990

ALVY T. MCQUEEN, PETITIONER

v.

COMPTROLLER OF PUBLIC ACCOUNTS OF TEXAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court had jurisdiction to grant injunctive and monetary relief against the United States with respect to an alleged violation by government agents of Rule 6(e) of the Federal Rules of Criminal Procedure.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-965

ALVY T. MCQUEEN, PETITIONER

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v.

UNITED STATES OF AMERICA,
and COMPTROLLER OF PUBLIC ACCOUNTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals in these consolidated cases (Pet. App. 1a-16a) is reported at 907 F.2d 1544. The orders of the United States District Court for the Western District of Texas in *McQueen* v. *Bullock* (Pet. App. 20a-25a) and of the United States District Court for the Southern District of Texas in *McQueen* v. *United States* (Pet. App. 26a-27a) are not reported.

JURISDICTION

The judgments of the court of appeals were entered on August 9, 1990. A petition for rehearing was denied on September 14, 1990. Pet. App. 17a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is engaged in the business of distributing motor fuels in the State of Texas. The United States and the State of Texas have been conducting investigations into petitioner's failure to pay state and federal motor fuel excise taxes. Internal Revenue Service Special Agent Mark Hughes was part of the federal task force investigating industry-wide motor fuel excise tax evasion and was also assigned to assist an attorney for the government in the conduct of certain federal grand jury investigations in the Southern District of Texas.[1] In June of 1988, Hughes was informed that petitioner was removing business records from his office to prevent their examination. Hughes obtained a search warrant and successfully seized the records petitioner had removed. Theretofore, petitioner had not been a target of the grand jury investigation.[2] Shortly thereafter, however, a grand jury investigation of petitioner was commenced. Pet. 4-5.

2. In September of 1988, Special Agent Hughes permitted agents of the Comptroller of the State of Texas to examine and copy the documents that had been seized under the search warrant. The Comptroller used that information to assess motor fuel excise taxes against petitioner.[3]

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[1] See C.A. Doc. 9, Exh. 19; Doc. 23, at 1. "Doc." references are to the documents in the original record in the court of appeals in *McQueen v. United States*, as numbered by the clerk of the district court.

[2] Doc. 22, at 1; Doc. 23.

[3] Doc. 9, Exh. 19.

Certain of petitioner's assets were thereafter seized by the Comptroller to satisfy the assessments. Pet. 6.

3. Petitioner then instituted two actions in the federal courts. In the first action (*McQueen* v. *Bullock*), brought in the United States District Court for the Western District of Texas, petitioner sought a return of the property seized by the Comptroller and an injunction against further assessments without providing petitioner a pre-deprivation hearing. Pet. App. 28a-36a. The district court found that the relief requested by petitioner was barred by the Tax Anti-Injunction Act (28 U.S.C. 1341) and therefore dismissed the action. Pet. App. 22a, 25a.

4. In the second suit (*McQueen* v. *United States*), petitioner alleged (Pet. App. 37a) that the state assessments were based upon information obtained by a federal grand jury and provided to the State in violation of Rule 6(e) of the Federal Rules of Criminal Procedure, which prohibits (in the absence of a court order) certain disclosures of "matters occurring before the grand jury." Fed. R. Crim. P. 6(e)(2). In petitioner's view (Pet. 5), the seized records were "matters occurring before the grand jury" merely because Hughes had been assigned to assist the attorney for the government in the conduct of the industry-wide investigation. Since there had been no order authorizing the disclosure of the seized materials to the State authorities, petitioner contended that the disclosure violated Rule 6(e). Accordingly, petitioner asked the United States District Court for the Southern District of Texas to enjoin the United States from further disclosures of grand jury material, to require the Comptroller and the United States to return all grand jury materials to the grand jury, and to assess against the United States and the Comptroller actual and punitive damages for the improper disclosure of the grand jury material. Pet. App. 41a. The district court held that the materials disclosed to the Comptroller did not fall within

the scope of "matters occurring before the grand jury" and, accordingly, dismissed the complaint for failure to state a cause of action. Pet. App. 26a-27a.

5. The court of appeals consolidated the appeals and affirmed both orders. In *McQueen* v. *Bullock*, the court held that petitioner had a "vast arsenal" under Texas law to challenge the assessments against him and that, therefore, Texas provided remedies that are " 'plain,' 'speedy,' and 'efficient.'" Pet. App. 12a. The Tax Anti-Injunction Act, by its express terms, therefore barred the federal courts from considering his claims. *Ibid.* In *McQueen* v. *United States*, the court concluded that the suit must be dismissed under the doctrine of sovereign immunity because the United States had not consented to be sued for violations of Rule 6(e). Pet. App. 14a. Noting that the proper remedy for violations of Rule 6(e) is to punish or discipline the individuals responsible for breaches of grand jury secrecy (Pet. App. 14a-15a), the court ruled that, in suing the United States, petitioner "had opted for a procedure and for relief which is not available to him." *Ibid.*

ARGUMENT

The United States was not a party to the proceedings in *McQueen* v. *Bullock* in either the district court or the court of appeals. Accordingly, this response is limited to the petition for certiorari in *McQueen* v. *United States*.

1. The holding of the court of appeals that sovereign immunity barred petitioner's suit against the United States for monetary damages and injunctive relief is correct, and does not conflict with the decision of any other court. As the court of appeals concluded (Pet. App. 14a-15a), the nondisclosure provisions of Rule 6(e) create no private right of action against the United States; instead, the Rule is to be enforced by sanctions directed to the individual attorneys

and agents involved in the grand jury proceedings. See *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 263 (1988); *Barry* v. *United States*, 865 F.2d 1317, 1321-1322 (D.C. Cir. 1989); *Blalock* v. *United States*, 844 F.2d 1546, 1551 (11th Cir. 1988); *In re Grand Jury Investigation (Lance)*, 610 F.2d 202, 214 (5th Cir. 1980); *United States* v. *Dunham Concrete Products, Inc.*, 475 F.2d 1241, 1248 (5th Cir. 1973).[4]

The "plain language" of the Rule (*United States* v. *John Doe, Inc. I*, 481 U.S. 102, 109 (1987)) mandates this conclusion. By its terms, Rule 6(e) imposes an obligation of secrecy only on those individuals involved in the investigation: grand jurors, stenographers, attorneys for the government and agents assisting the attorneys for the government. The Rule further specifies that "[n]o obligation of secrecy may be imposed on any other person except in accordance with these rules." Fed. R. Crim. P. 6(e)(2). Nothing in the Rule indicates that it was intended to provide a waiver of sovereign immunity that would allow damage suits and actions for injunction to proceed directly against the United States for violations of its terms.

Contrary to petitioner's contentions (Pet. 11, 14-15), the supervisory powers of district courts over grand juries have never been thought to provide a grand jury target a private right of action against the United States. No case has held that a district court's supervisory authority over grand juries confers upon it jurisdiction to award damages and to enter injunctions against the United States. As this Court has noted in a different context, violations of Rule 6(e) are remedied by focusing "on the culpable individual rather than

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[4] Petitioner (Pet. 15, 19-20) has read too much into the caption of these court of appeals cases. Even though the nominal party in each was the United States, the relief sought by the complainant in each case was directed to the individuals involved in conducting the investigation. *E.g.*, *Barry* v. *United States*, 865 F.2d at 1319; *In re Grand Jury Investigation (Lance)*, 610 F.2d at 609.

granting a windfall to the unprejudiced defendant." *Bank of Nova Scotia* v. *United States*, 487 U.S. at 263. While the district court may discipline and sanction an offending individual, direct monetary or injunctive relief against the United States is not available under Rule 6(e). See *Blalock* v. *United States*, 844 F.2d at 1561; *In re Grand Jury Investigation (90-3-2)*, 748 F. Supp. 1188, 1204-1206 (E.D. Mich. 1990).

Petitioner is mistaken in asserting (Pet. 14) that this Court's decision in *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418 (1983), authorizes relief directly against the United States as a remedy for violations of Rule 6(e). *Sells* was not a suit against the United States. To the contrary, in *Sells*, the Department of Justice Civil Division applied to the district court for an order authorizing an automatic right of access to grand jury materials for the civil attorneys of the Department. This Court held that disclosure to the government's civil attorneys of "matters occurring before a grand jury" may be made only upon a showing of particularized need to gain access to those materials. In defining the requirements that must be met in order to obtain disclosure of grand jury materials in *Sells*, this Court did not suggest that the district court had jurisdiction over the United States in a private action for damages or other relief for a breach of grand jury secrecy.[5]

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[5] The cases upon which petitioner relies (Pet. 16-21) provide no support for his direct claim against the United States. All of those cases involve challenges to Rule 6(e) orders, either in the court which issued the order by way of motion to modify or revoke the order, or in another court by way of motion to suppress at a trial the use of evidence obtained under a Rule 6(e) order. None of them holds that Rule 6(e) provides a complaining target a private right of action against the United States for damages and injunctive relief.

2. The petition does not, in any event, present an issue warranting review by this Court. Petitioner has assumed that documents seized by IRS agents pursuant to a search warrant are "matters occurring before the grand jury," and are subject to the restrictions on disclosure contained in Rule 6(e), merely because the agent who initiated the search and seizure had also been assigned to assist an attorney for the government in conducting a grand jury investigation. Although the court of appeals found it unnecessary to address that assertion, the district court found that the documents obtained by the search warrant were not "matters occurring before the grand jury," and that the restrictions of Rule 6(e) were therefore "not implicated" by the disclosure (Pet. App. 26a).

It is well established that documents seized pursuant to a search warrant are not deemed to be "matters occurring before the grand jury" merely because the agent who obtained the warrant was assisting an attorney for the government in the conduct of a grand jury investigation. See *In re Grand Jury Subpoena: United States v. Under Seal*, 920 F.2d 235, 241 (4th Cir. 1990); *Anaya v. United States*, 815 F.2d 1373, 1378-1379 (10th Cir. 1987); *In re Grand Jury Matter (Catania)*, 682 F.2d 61, 64 (3d Cir. 1982). As these cases have held, the confidential "matters occurring before the grand jury" that are protected by Rule 6(e) are only those matters that would reveal what has transpired before the grand jury. The content of records seized pursuant to a search warrant would not disclose what had transpired during the grand jury investigation of petitioner. Because the confidentiality requirements of Rule 6(e) were thus simply not violated (Pet. App. 26a), this case provides no basis for this Court to review the scope of a district court's authority to remedy breaches of grand jury secrecy.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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FEBRUARY 1991

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UNITED STATES OF AMERICA and
COMPTROLLER OF PUBLIC ACCOUNTS,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

NO. 90-965

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

1. Introduction

The United States and the Comptroller devote the bulk of their Briefs to side issues—in reality diversions—in the form of alternative statements of the case and arguments that the court of appeals did not accept

and that are not valid in the posture of these cases. Particularly in *McQueen II* (the grand jury case), they devote little attention to the issue decided by the court of appeals and presented in the petition.

We cannot fully respond to these side issues because of space limitations and, in any event, full briefing on the merits is not appropriate in the briefs on the petition. We shall set forth why these side issues are irrelevant and spurious in this case. We shall also note by way of footnote certain instances in which the United States and the Comptroller exceeded the brounds of fair presentation in their Briefs in Opposition. Finally, we ask the Court to remember that these side issues were not accepted by the court of appeals for a reason; the reason is that they lack merit when fully and fairly considered in the context of these cases.

2. The Grand Jury Case—McQueen II

a. Statement

The United States is wrong to represent to this Court (Br. p. 2) that Petitioner was not a target of the grand jury at the time the search warrant was issued and the documents seized. That is a mixed factual and legal issue that is controverted, is not established in the record below or in law, and can only be established after appropriate trial level development.[1]

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1. The United States' alleged record evidence (See Br. 2, at fn.2) for this notion is the United States' Motion to Dismiss and Memorandum in Support, neither of which contain any evidence by affidavit or otherwise. The real genesis for this controverted view of the facts came in the form of an *ex parte* letter from the Assistant United States Attorney in charge of the grand jury investigation ("AUSA") who authorized the IRS agents assisting her in the grand jury investigation to make the disclosures in question to the Comptroller and to

The United States is also wrong in representing (Br. 3) that Petitioner's allegation that the documents in question were grand jury matters is based *only* upon the fact that Mr. Hughes, an IRS agent assigned to assist the grand jury, made the disclosures. Even if that were true (it is not true and the record shows it is not true),[2] it is irrelevant to the issue of whether Petitioner stated a claim upon which relief can be granted.

b. Argument

The United States wastes most of its argument (Br. 4-6) asserting a proposition not in issue here—the proposition that Rule 6(e), Federal Rules of Criminal Pro-

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the IRS for civil tax purposes. In the *ex parte* letter to the district court, the AUSA sought to excuse her authorization of the disclosures, the very conduct in issue in this case, by making self-serving, controverted, unsworn and untested allegations as to the relationship of the grand jury investigation to the disclosures in question and further sought to poison the district court's attitude toward the Petitioner by making allegations of criminal misconduct which have never even resulted in a criminal indictment much less been proven. The district court below claims not to have read the letter or considered it in dismissing the case, and the court of appeals correctly did not consider the letter as being pertinent to the issue of whether the dismissal was proper. That the United States would allow the AUSA to attempt to manipulate justice through the *ex parte* letter is itself outrageous. That the United States would now before this Court resurrect as the unmitigated truth the unproven and controversial allegations made in that *ex parte* letter is even more outrageous.

2. The limited record developed below shows that the allegation is also based upon (1) a meeting, immediately after the seizure, between counsel for Petitioner and Ms. Wong, Mr. Hughes' direct supervisor (both of whom were working for the AUSA to assist the grand jury), during which Petitioner was identified as a target of the grand jury investigation to the disclosures in question and further sought investigation and (2) various telephone conferences between the AUSA and counsel for Petitioner immediately after the seizure. See Counsel's Affidavit, par. 7, pp. 2-3, and par. 10, p. 4 (including attached contemporaneous letters); see also Internal Revenue Manual,

cedure,[3] does not create a private right of action against the United States. Petitioner agrees. (See Pet. 12-13).

We turn therefore to the only issue presented by the court of appeals opinion and the petition in *McQueen II* —i.e., whether a district court in the exercise of its supervisory powers can issue appropriate remedial orders against third parties (including both the United States and the Comptroller) illegally in possession of grand jury information. The United States argues as a centerpiece of its opposition (Br. 5) that the language of Rule 6(e)(2) denies the supervising district court the power to issue orders affecting third persons in possession of grand jury matters.

The language of Rule 6(e)(2) now relied upon by the United States has the limited purpose of insuring that grand jury witnesses are not subject to the obligation of secrecy. See Notes of Advisory Committee on Rules, Note to Subdivision (e), par. 2. That language was not meant to emasculate the district courts' power to control the use and dissemination of secret grand jury information, and the United States cites neither authority nor logic for that reading of Rule 6(e)(2). Indeed the argument is so absurd[4] that the United States' need to make

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par. 9267.32(2) (prohibiting IRS agents assigned to assist a grand jury from participating in IRS investigations of the subject matter or target of the grand jury investigation); and *In re Grand Jury Subpoena*, 920 F.2d 235, 243 (4th Cir. 1990) (cautioning in a strikingly similar case that "the procedures such as those utilized in this case might, under *slightly* varying circumstances, jeopardize an entire investigation." (Emphasis supplied)).

3. All Rules references are to the Federal Rules of Criminal Procedure except as specifically noted.

4. The absurdities are exemplified by the following: If a Court allowed disclosure to the Justice Department by order properly granted under Rule 6(e)(3)(C)(i) for use in an antitrust proceeding, the United States' interpretation of Rule 6(e)(2) is that the Justice

it a centerpiece of its argument affirms the weakness of the United States' position, as does the fact that the United States itself asserts the contrary when the United States finds it in its interest to have a court order the return of grand jury information in the hands of persons not directly within the scope of Rule 6(e)(2).[5]

The United States and the Comptroller assert alternatively that documents can *never* be grand jury matters prohibited from disclosure. (See U.S. Brief p. 7; and Comptroller's Br. pp. 6-7.) The argument *in the context of this case* is that anyone involved with the grand jury (i.e., the grand jurors, the government attorney (AUSA here), or other persons assisting the grand jury (IRS agents here)) have unilateral authority to disclose documents used in the grand jury investigation however acquired by the grand jury (e.g., by subpoena, search warrant or otherwise) free of the requirement that they first

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Department could then disseminate the information however and to whomever it liked, including for instance to the IRS in clear violation of this Court's holding in *United States v. Sells Engineering, Inc.*, 429 U.S. 418 (1983). The United States' interpretation of Rule 6(e)(2) is also contrary to the consistent holdings of this Court and other courts that the supervising district court has power to include in a Rule 6(e)(3)(C) order limitations upon further dissemination of grand jury information and even order return to the grand jury of the information previously disclosed. E.g., *Sells Engineering, supra*, pp. 422-423, n.6 (court can protect target from "effects of past disclosures"); *State of Illinois v. Sarbaugh*, 552 F.2d 768, 775 n.10 (7th Cir. 1977), *cert. den.*, 434 U.S. 889 (1977) (court can prohibit further disclosure); and *Matter of Special March 1981 Grand Jury*, 735 F.2d 575, 577 (7th Cir. 1985) (court can order return). Certainly if the supervising district court has power to limit use and further disclosure in cases of legally authorized disclosures of grand jury information, the supervising district court has equal power in cases, such as this case, of illegal disclosures.

5. In *United States v. Charles Hayes, Individually and d/b/a Challenger, Ltd.*, (E.D. Ky.—Civ. No. 90-175), cited in the petition, the United States invoked Rule 6(e) to have the court order return

obtain a Rule 6(e)(3)(C) order. The argument, if accepted, would allow a blatant end-run around this Court's holdings in *United States v. Baggott,* 429 U.S. 476 (1983), and *United States v. Sells Engineering, Inc.,* 429 U.S. 418 (1983).

The cases cited by the United States and the Comptroller do not stand for that absurd proposition. Those cases simply suggest that, *in a Rule 6(e)(3)(C) proceeding,* a district court can permit disclosure of documents in appropriate cases. See e.g., *In Re Grand Jury Proceedings,* 851 F.2d 860 (6th Cir. 1988) (rejecting even the proposition that documents are never grand jury matters in the context of a Rule 6(e)(3)(C) proceeding). Indeed, the United States itself asserts the contrary position when it does not desire to disclose documents in a Rule 6 (e)(3)(C) proceeding instituted by a private party. In *Federal Deposit Insurance Corporation v. Ernst & Whinney,* 921 F.2d 83, 87 n.1 (6th Cir. 1990), the Government objected to even preparing a list of documents which identifies the documents as being considered by the grand jury, for such a list (just as the documents themselves) could show the thrust of the grand jury investigation. This conflict among the circuits (and even within the United States' own litigating positions) is not relevant here, for no Rule 6(e)(3)(C) order was obtained in this case. If, however, this Court were to believe that this side issue were somehow involved in this case, it should grant the writ to resolve the conflict among the circuits on this issue.

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of certain computer storage equipment which the United States alleged contained "grand jury material protected by Fed. R. Crim. P. 6(e)." (United States Complaint for Injunctive Relief and Writ of Possession, par. 10.) Needless to say, the United States succeeded in obtaining an order for the return of the alleged "grand jury material."

2. Tax Injunction Act Case—McQueen I

At the threshold, the Comptroller argues (Br. 7-8) that, even if the court of appeals' actual holding raises an important issue for this Court's review, this Court should decline review because the record below fails to establish Petitioner's refund or bonding remedies were not adequate. The easy answer is that, even if *arguendo* that were an element of Petitioner's case, the case was dismissed before Petitioner was required to prove the elements of his case.[6] More importantly, that is not an element of Petitioner's case, for Due Process as interpreted in *Commissioner of Internal Revenue v. Shapiro,* 424 U.S. 614 (1976) requires a prompt post-deprivation hearing after a jeopardy assessment without *any* predicate showing of inadequacy of other remedies.

Turning to the issue actually presented here, the Comptroller's position is a forceful argument that this Court should grant the petition in this case. The Comptroller's Brief establishes that, at the same time the Comptroller was asserting to the court of appeals below that the Petitioner had a general injunctive remedy in the state courts, the Comptroller knew that the Texas legislature had, at the Comptroller's own request, enacted a statute, the Texas Anti-Injunction Statute (Texas Tax Code, § 112.108), which denied to the Petitioner the precise remedy the Comptroller successfully urged to the court of appeals was available to Petitioner.

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6. The only hearing was a hearing on Petitioner's request for preliminary injunction, in which Petitioner is not required to prove his whole case upon penalty of dismissal. The Comptroller raises no issue as to the adequacy of Petitioner's pleadings, and questions only Petitioner's alleged failure of proof.

The Comptroller failed to advise the court of appeals of this dramatic development that would have almost certainly defeated his position in the court of appeals.[7] This Court should accordingly grant the petition either for consideration on the merits or remand to the court of appeals to consider this dramatic development.

Recognizing that the Texas Anti-Injunction Statute destroys the position he successfully urged below, the Comptroller amazingly argues that the Texas Anti-Injunction Statute violates the Texas Constitution's "open courts" guarantee and will not be applied by Texas courts to deny Petitioner a remedy. Texas Constitution, Art. I, § 13 (quoted at p. 14, n.18 of the Comptroller's Brief in Opposition). The argument that the Texas Anti-Injunction Statute is unconstitutional is so fraught with uncertainty[8] that it should not be accepted by this Court without full briefing and argument or without remand to the court of appeals for full consideration.

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7. No clearer breach of the duty of candor can be imagined. See *Board of License Com'rs of Town of Tiverton v. Pastore*, 469 U.S. 238, 240 (1985); and *McCoy v. Court of Appeals of Wisconsin, District 1*, 486 U.S. 429, 440-441 (1988).

8. Under traditional Tax Injunction Act (28 U.S.C., Section 1341) analysis, the Comptroller would have to convince this Court that there is no reasonable doubt that the Texas courts would find the Texas Anti-Injunction Statute unconstitutional. Even the cases cited by the Comptroller that have addressed the issue of the Texas legislature's power to interpose sovereign immunity to limit tax litigation remedies have not given even the slightest hint that the interposition of sovereign immunity is unconstitutional. *E.g., Hammerman & Gainer, Inc. v. Bullock, supra;* and *Contran Corp. v. Bullock*, 567 S.W.2d 616, 617 (Civ. App.—Austin, 1978, no writ). This Court's decision in *Pennzoil Company v. Texaco Inc.*, 481 U.S. 1 (1987), does not in any way establish, as the Comptroller would have it, that Texas courts would invoke the open courts guarantee to declare the Texas Anti-Injunction Statute unconstitutional.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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